Supreme Court, U.S.
FILED

951960 JUN 3 1996

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1995

SPANG & COMPANY, *et al.*,

Petitioners,

v.

JEAN E. BRYTUS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
WILLIAM T. MARSH
SPANG & COMPANY
P.O. Box 751
Brugh Avenue
Butler, PA 16001
(412) 287-8781

HOLLIS T. HURD
(Counsel of Record)
THE BENEFITS DEPARTMENT
900 Fifth Avenue
Pittsburgh, PA 15219
(412) 471-9924

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

92pp

QUESTION PRESENTED

Where an employee benefit plan is embodied in a collective bargaining agreement that contains no provision regarding amendment, but the collective bargaining agreement terminates and the collective bargaining relationship ends due to plant closing, is the employer prevented by the Employee Retirement Income Security Act from amending the plan, with the result that the collective bargaining agreement continues to govern in perpetuity, contrary to the National Labor Relations Act?

PARTIES TO THE PROCEEDING

The parties are Spang & Company and the Pension Plan for Former Bargaining Unit Employees of Fort Pitt Bridge and Electric Weld Divisions at Canonsburg, PA, Plant, Petitioners; and Jean E. Brytus, John Lazor, Wheat Giacobbe, John Stanko, Steve Kotyk, Alex Warcholak, John Kotyk, Sam Borielle, Jr., and Edward J. Golonka, Respondents (on behalf of themselves and others similarly situated).

Pursuant to Rule 29.6, petitioners state that the only corporation among petitioners and respondents is Spang & Company, which has no parent company nor any subsidiaries that are not wholly owned.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 10

I. THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS AS TO THE AMENDABILITY OF AN EMPLOYEE BENEFIT PLAN, EMBODIED IN A COLLECTIVE BARGAINING AGREEMENT, AFTER THE COLLECTIVE BARGAINING AGREEMENT TERMINATES AND FURTHER CONFLICTS WITH THIS COURT'S JURISPRUDENCE UNDER THE NLRA 12

II. BY MISAPPLYING THIS COURT'S DECISION IN *CURTISS-WRIGHT CORP. V. SCHOONEJONGEN*, THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF CONFLICT BETWEEN ERISA AND THE NLRA AND CREATES AN INTOLERABLE BURDEN ON COLLECTIVELY BARGAINED EMPLOYEE BENEFIT PLANS 19

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Adcox v. Teledyne, Inc., 21 F.3d 1381 (6th Cir.), *cert. denied*, 115 S.Ct. 193 (1994) 14, 15, 17

Allied Chemical Workers v. Pittsburgh Plate Glass, 404 U.S. 157 (1971) 19

Anderson v. Alpha Portland Industries, Inc., 836 F.2d 1512 (8th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989) 17, 18

Curtiss-Wright Corp. v. Schoonejongen, 115 S.Ct. 1223 (1995) 10, 11, 19, 20, 22, 25

Heussner v. National Gypsum Co., 887 F.2d 672 (6th Cir. 1989) 15, 17

Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete, 484 U.S. 539 (1988) 13, 24

Litton Fin. Printing Div. v. NLRB, 501 U.S. 190 (1991) 12, 18

Lockheed Corp. v. Spink, cert. granted, 116 S.Ct. 806 (1996) 25

Merk v. Jewel Cos., Inc., 848 F.2d 761 (7th Cir.), *cert. denied*, 488 U.S. 956 (1988) 18

NLRB v. Amax Coal Co., 453 U.S. 322 (1981) 24

NLRB v. Sands Manufacturing Co., 306 U.S. 332 (1939) 23

Nobers v. Crucible Inc. 1975 Salaried Retirement Plan, 925 F.2d 418, 13 Emp. Ben. Cas. (BNA) 2741 (3d Cir. 1991) 16

Nolde Bros. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243 (1977) 18

TABLE OF AUTHORITIES – Continued

Page

UMW Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982) 24

Walsh v. Great Atlantic & Pacific Tea Co., 96 F.R.D. 632 (D.N.J.), *aff'd*, 726 F.2d 956 (3d Cir. 1983) 16

STATUTES

Employee Retirement Income Security Act of 1974, as amended

Sections 3(1), -(2) and -(3), 29 U.S.C. §§ 1002(1), -(2) and -(3) 13

Section 203, 29 U.S.C. § 1053 13

Section 402(b)(3), 29 U.S.C. § 1102(b)(3) 19

Section 502(d)(1), 29 U.S.C. § 1132(d)(1) 5

Section 502(e)(2), 29 U.S.C. § 1132(e)(2) 26

Section 514(d), 29 U.S.C. § 1144(d) 3, 22

Section 4041(a)(1), 29 U.S.C. § 1341(a)(1) 5

29 C.F.R. § 2617.6(a) 6

ADMINISTRATIVE INTERPRETATIONS

Pension Benefit Guaranty Corporation

Opinion Letter 85-10 16

Opinion Letter 89-01 16

Treas. Reg. § 1.401-2(b)(1) 16

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

S. Bruce, *Pension Claims: Rights and Obligations* (BNA Books, 2d ed. 1993) 18

1A A. Corbin, *Corbin on Contracts* § 186 (1963) 21

Restatement (Second) of Contracts § 89(a) (1979) 21

U.S. Department of Labor, *Abstract of 1992 Form 5500 Annual Reports* (1996) 24

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The order of the court of appeals affirming the district court orders is reprinted in the Appendix at 1a. The report and recommendation of the Magistrate Judge as to liability is reprinted in the Appendix hereto at 4a and as to remedy at 35a. The order of the district court adopting the report and recommendation of the Magistrate Judge as to liability is reprinted in the Appendix hereto at 26a and as to remedy at 51a. The denial of rehearing in the court of appeals is reprinted in the Appendix at 56a. None of the decisions are reported.

JURISDICTION

The order of the court of appeals was filed on February 7, 1996. A timely petition for rehearing was denied on March 5, 1996. This petition is being timely filed within 90 days of that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer –
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(d) of the NLRA provides in pertinent part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement . . . *Provided*, That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract . . .

Section 402(b) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1102(b), provides in pertinent part:

> Every employee benefit plan shall –
>
> * * *

> (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan.

Section 514(d) of ERISA, 29 U.S.C. § 1144(d), provides:

> Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law.

STATEMENT OF THE CASE

1. This case involves the interrelationship of collectively bargained pension agreements (subject to federal labor law) and the pension plan resulting therefrom (subject to ERISA). From approximately 1896 to 1963, a corporation then known as Fort Pitt Bridge Works (the "Employer") operated two steel fabricating plants in Canonsburg, Pennsylvania, known as Fort Pitt Bridge and Electric Weld. The bargaining unit employees came to be represented by the United Steelworkers of America, AFL-CIO-CLC (the "Union"), though there were separate local unions and separate collective bargaining agreements for each plant.

In about 1950, the Employer entered into separate pension agreements for each plant requiring the Employer to provide defined benefit pensions as specified therein. Neither of the pension agreements prohibited return of surplus assets to the Employer. In order to fulfill its obligations under the two pension agreements,

the Employer adopted a pension plan providing the specified defined benefit pensions to the bargaining unit employees and further providing that, upon termination of the plan, any surplus remaining after satisfaction of all liabilities for all pension benefits under the plan would be returned to the Employer.

In 1963, petitioner Spang & Company bought all of the stock of the Employer.[1] Thereafter, from 1963 to 1978, the Employer entered into a series of three-year pension agreements for each plant that, for the first time, provided that contributions made by the Employer under those agreements could not revert to the Employer. The Employer amended its pension plan to conform to the new pension agreements. The latest in that series of pension agreements were the 1978 pension agreements, which were scheduled to terminate, by their own terms, on September 30, 1981 (the "1978 Pension Agreements").

During the late 1970's and continuing into the early 1980's, the Employer, like much of the domestic steel industry, suffered the effects of poor economic and business conditions resulting from foreign imports. Consequently, although Spang had been successful in reviving the Employer and providing jobs for 18 years, it reluctantly closed the Fort Pitt Bridge and Electric Weld plants on September 30, 1981 – the same day that the pension agreements terminated. On that same date, the Employer delivered to the Union an amended and restated pension

---

[1] The corporation formerly known as Fort Pitt Bridge Works was ultimately merged into petitioner Spang & Company. For simplicity, we will continue to refer to the employing entity as the "Employer."

plan document that reinstated the provision expressly requiring that any surplus be returned to the Employer. The surplus was estimated at that time to be somewhere between $200,000 and $1,000,000.

So-called effects bargaining, which had been in progress between the Employer and the Union during the summer, resulted in written shutdown agreement signed on October 17, 1991 (the "Shutdown Agreement"). The Shutdown Agreement ratified the termination of the 1978 Pension Agreements on September 30, 1981, saying, "The said basic Labor Agreements and all ancillary agreements related thereto (e.g. the Insurance Agreements and the Pension Agreements) terminated on September 30, 1981 at 11:59 p.m." Pursuant to the Shutdown Agreement, the Employer paid over $641,000 in immediate, additional benefits that the employees were not otherwise entitled to, such as severance pay. With that, the bargaining relationship between the Employer and Union, with regard to Fort Pitt Bridge and Electric Weld, ended.

While the 1978 Pension Agreements terminated on September 30, 1981, the pension plan embodied in those agreements was not terminated at that time.[2] Rather, on November 18, 1981, promptly after the Shutdown Agreement was concluded, the Employer formalized the adoption of the amended and restated pension plan which the

---

[2] Under ERISA, a pension plan is a juridical entity not unlike a corporation, trust or estate. *See* ERISA section 502(d)(1), 29 U.S.C. § 1132(d)(1). It can be terminated only by successfully completing the process set out in Title IV of ERISA, including the approval of the Pension Benefit Guaranty Corporation. ERISA sec. 4041(a)(1), 29 U.S.C. § 1341(a)(1).

Employer had provided to the Union during the effects bargaining. The amended and restated plan restored the provision (which the plan had included from 1950 to 1963) requiring that surplus assets remaining after plan termination be returned to the Employer.

In May 1988, the Employer terminated the pension plan under Title IV of ERISA, properly and timely notifying the participants in the pension plan, the Pension Benefit Guaranty Corporation, and the Internal Revenue Service. After all necessary approvals were received, the administrator of the plan purchased a group annuity contract satisfying all liability for all pension benefits under the plan[3] and then, carrying out the express terms of the plan, returned the remaining surplus to the Employer. At termination, as it had from 1950 to 1963 and then again since the shutdown in 1981, the plan expressly required that residual assets be returned to the Employer.

2. In November 1988, respondents Jean Brytus, John Lazor, Wheat Giacobbe, John Stanko, Steve Kotyk and Alex Warcholak (all participants or beneficiaries of the pension plan) filed suit in the U. S. District Court for the Western District of Pennsylvania (No. 88-2548) claiming that the Employer's recovery of the surplus assets (a) violated the 1978 Pension Agreements and therefore was actionable under section 301 of the Labor Management Relations Act, (b) deprived respondents of their right to enjoy the surplus and therefore was actionable under

---

[3] By this method, required by regulations of the Pension Benefit Guaranty Corporation under ERISA, all participants in the plan have received (or will receive) all accrued and vested pension benefits due them under the plan. 29 C.F.R. § 2617.6(a).

sections 502(a)(1)(B) and 502(a)(3) of ERISA, and (c) constituted a breach of fiduciary duty under section 404(a) of ERISA. Substantially identical actions were filed in March 1989 by respondents John Kotyk and Sam Borielle (No. 89-579) and in June 1991 by respondent Edward Golonka (No. 91-1041).[4] The three actions were treated as one in the district court and in the court of appeals (and are so treated in this petition).

Respondents moved for summary judgment asserting that the 1978 Pension Agreements constituted the *only* documents in which the terms of the plan were to be found when the plan terminated in 1988, despite the fact that the 1978 Pension Agreements had terminated in 1981. Respondents further asserted that the Employer's purported amendment of the pension plan in 1981 to reinstate the provision for reversion of surplus assets to the Employer was invalid because the 1978 Pension Agreements contained no provision for amendment and thus were effectively unamendable. Finally, respondents asserted that the 1978 Pension Agreements plainly barred reversion of the surplus assets to the Employer.[5]

---

[4] In the first case, plaintiffs' motion for class certification was denied as untimely, so the same counsel filed the second case and made a timely motion for class certification. When the motion was denied in the second case, on the ground that it represented evasion of the ruling in the first case, different counsel was recruited to file the third case.

[5] Respondents' motion for summary judgment was based solely on the 1978 Pension Agreements. No claim was made with regard to the Shutdown Agreement.

On September 6, 1994, the district court (per Donald J. Lee, J.) granted respondents' motion for summary judgment as to liability, adopting as its opinion the report and recommendation of June 30, 1994 by Magistrate Judge Kenneth L. Benson (the "Opinion"). As to the continued vitality of the 1978 Pension Agreements after they terminated in 1981, the Opinion agreed with respondents, expressly holding that:

> although the [1978] Pension Agreement did terminate in 1981, it was, at the time of termination, *the sole governing plan document* . . . Thus, the [1978 Pension] Agreement did survive its termination, in that it also constituted the sole controlling plan document. Thus, the Plan provisions for no reversion and for distribution in the event of termination survive the [1978 Pension] Agreement's termination.

App. at 19a-20a (emphasis added). As to the ability of the Employer to amend, the Opinion expressly held that the Employer had no ability to amend the plan, since the 1978 Pension Agreements (being collective bargaining agreements) did not contain any provision for amendment:

> Spang's attempts to amend the Plan in November, 1981 [to reinstate the provision for reversion of surplus assets to the Employer], and June, 1988, must necessarily fail. In *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d Cir. 1994), the court found that an ERISA plan may not be amended unless the plan provides a specific procedure for amendment. Here, the Plan, as evidenced by the sole governing document [*i.e.*, the 1978 Pension Agreements], does not provide for amendment, and certainly not for unilateral amendment by Spang. Thus, any

> proposed amendments in 1981 and 1988 are invalid.

App. at 20a. And, finally, the Opinion agreed with respondents that the 1978 Pension Agreements forbade reversion of surplus pension assets to the Employer:

> It remains, then, to determine if the provisions in question entitle plaintiffs to summary judgment. Indeed, a reading of the Plan [the 1978 Pension Agreements] establishes that Spang may not retain the surplus. Further, the Plan [the 1978 Pension Agreements] also provides that, upon termination, the funds in the Plan shall be distributed in accordance with Section IX. That section provides for distribution of plan funds to participants. Although surplus funds are not specifically addressed therein, reading Section IX in concert with the non-reversion provision leads to the inescapable conclusion that the surplus funds must be distributed to the participants in the fund. In any event, reversion to Spang is certainly not permissible. Summary judgment is appropriate in this case.

App. at 21a.

Having granted summary judgment to respondents, the district court referred the matter of remedy to the magistrate judge. On February 10, 1995, the magistrate judge issued a report and recommendation as to remedy, which the district court adopted as its opinion by order of March 30, 1995, ordering that the plan be reconstituted, that the Employer be required to repay the reversion with interest, and that all participants and beneficiaries of the plan share in the recovery. The report and recommendation as to remedy expressly stated that relief was granted

under ERISA sections 502(a)(1)(B) and 502(a)(2), rather than under section 301 of the LMRA. App. at 46a.

3. The U. S. Court of Appeals for the Third Circuit affirmed without opinion. App. at 1a.

REASONS FOR GRANTING THE PETITION

This case sits at the intersection of federal labor law and employee benefit law. Labor law applies because the Employer and Union had a collective bargaining relationship and entered into collective bargaining agreements governed by the NLRA, namely, the 1978 Pension Agreements. Employee benefit law applies because those collective bargaining agreements obligated the Employer to provide pensions and thus gave rise to a pension plan. The question is how ERISA and the NLRA are to be applied after the collective bargaining agreement terminates and the collective bargaining relationship ends.

It is well established under the NLRA that, after the collective bargaining agreement terminates and the collective bargaining relationship ends, the employer is free to alter its employee benefit plans in any way that does not contravene rights that accrued or vested contractually before the collective bargaining agreement terminated. On the other hand, this Court's decision last term in *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223 (1995), reflects the principle that an employee benefit plan under ERISA may be unamendable if it does not contain a procedure for amending the plan, and collective

bargaining agreements rarely contain a procedure for amendment.

The decision below applies the *Curtiss-Wright* principle and concludes that the pension plan embodied in the 1978 Pension Agreements was unamendable even after the 1978 Pension Agreements terminated. As explained in the first point below, the decision below thereby puts ERISA squarely at odds with the NLRA and resolves the conflict by trampling the NLRA. As such, it conflicts with the jurisprudence of this Court under the NLRA and creates a conflict among the circuits, others of which have been able to harmonize ERISA and the NLRA in this regard without subordinating either.

As explained in the second point below, harmony between ERISA and the NLRA can be achieved simply by understanding that, with regard to an employee benefit plan embodied in a collective bargaining agreement, the "procedure for amending such plan" (required by ERISA) is the framework of law supplied by the NLRA for creating, amending and terminating collective bargaining agreements. Harmonizing ERISA and the NLRA not only makes sense; it is compelled by the express provision of ERISA that ERISA shall not be construed to impair any other federal law. And it avoids the absurd and intolerable result of the decision below that collective bargaining agreements have eternal life – controlling in perpetuity the terms of employee benefit plans embodied in them, even after the collective bargaining agreements themselves have terminated.

I. THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS AS TO THE AMENDABILITY OF AN EMPLOYEE BENEFIT PLAN, EMBODIED IN A COLLECTIVE BARGAINING AGREEMENT, AFTER THE COLLECTIVE BARGAINING AGREEMENT TERMINATES AND FURTHER CONFLICTS WITH THIS COURT'S JURISPRUDENCE UNDER THE NLRA.

It is well established under the NLRA that after a collective bargaining agreement terminates, the employer is no longer bound by that agreement except to honor rights that accrued or vested contractually under the agreement before it terminated:

> [A]n expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied . . . "An expired [collective bargaining agreement] . . . is no longer a 'legally enforceable document' " . . .
>
> * * *
>
> [C]ontractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement. Exceptions are determined by contract interpretation. Rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement.

Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 206-208 (1991).[6]

---

[6] After the contractual relationship ends (due to termination of the collective bargaining agreement), the NLRA

It is equally clear under ERISA that a program of employee benefits brought into being by a collective bargaining agreement may constitute an "employee benefit plan" within the meaning of ERISA.[7] In that instance, ERISA compels recognition of a legally distinct "plan" that is subject to the substantive minimum standards of ERISA, and so the plan must honor any rights guaranteed by ERISA, even after expiration of the collective bargaining agreement that gave rise to the plan. For example, ERISA requires that pension plans contain a vesting schedule meeting the requirements of ERISA. ERISA sec. 203, 29 U.S.C. § 1053. After the termination of a collectively bargained pension agreement, an employer may

---

statutorily prohibits the employer from changing the terms and conditions of employment going forward, so long as the bargaining relationship exists, unless and until the employer and union reach impasse in negotiations for a new collective bargaining agreement or the union waives its right to bargain. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 539 (1988). The statutory duty to maintain the status quo is not involved in this case, however, since the plant was closed, and all bargaining unit employees terminated, coincident with the termination of the 1978 Pension Agreements on September 30, 1981. Instead, this case is focused strictly on the supposed perpetual vitality of the 1978 Pension Agreements *as contracts* after they terminated on September 30, 1981.

[7] ERISA defines employee benefit plans as "any plan, fund or program" established or maintained by an employer providing benefits of specified types. ERISA sections 3(1), -(2) and -(3), 29 U.S.C. §§ 1002(1), -(2) and -(3). It matters not whether the terms of the "plan, fund or program" are set forth in an officially designated plan document, an insurance contract, a collective bargaining agreement, or any other written form.

not amend the pension plan so as to reduce the vesting below the substantive minimum standard required by ERISA.

So understood, the requirements of ERISA and the NLRA have peacefully co-existed in the decisions of the courts of appeal until the decision below. When an ERISA-covered plan has been created by a collective bargaining agreement but the collective bargaining agreement has terminated, and then employees or former employees have sued for benefits to which they believed they were entitled, the courts of appeal have made a two-step inquiry. First, the courts have inquired whether the right asserted is *statutorily* accrued and vested under ERISA. If not, the courts have made a second inquiry whether the right was *contractually* accrued or vested before the collective bargaining agreement terminated. If not, the courts of appeals have unanimously concluded (until the decision below) that no such right exists.

For example, in *Adcox v. Teledyne, Inc.*, 21 F.3d 1381 (6th Cir.), *cert. denied*, 115 S.Ct. 193 (1994), a collective bargaining agreement embodied a number of employee benefit plans including a severance pay plan. In connection with the closing of the plant, the employer and union negotiated a shutdown agreement that superseded and terminated the collective bargaining agreement that embodied the severance pay plan. Nevertheless, former employees sued for severance pay under the severance pay plan. The Sixth Circuit held that, after termination of the collective bargaining agreement, there was no continuing right to severance pay because (a) ERISA does not require accrual or vesting of welfare benefits such as

severance pay and (b) severance pay was not contractually vested before the collective bargaining agreement terminated.

The Sixth Circuit specifically held in *Adcox v. Teledyne, Inc.*, on facts analytically identical to the present case, that the terminated collective bargaining agreement was no longer "in force," and therefore conferred no rights, not even jurisdiction under ERISA.[8] The Sixth Circuit had earlier reached the same result on essentially the same facts in *Heussner v. National Gypsum Co.*, 887 F.2d 672 (6th Cir. 1989).[9]

In the present case, the right asserted (an inchoate interest in the surplus pension assets) was neither

---

[8] The Sixth Circuit noted, "the earlier, superseded collective bargaining agreement would have to be 'in force' for the district court to have jurisdiction over those claims under § 1132 [claim for benefits under ERISA section 502]; because it had 'expired' when a subsequent superseding agreement was made, it was no longer 'in force' and thus the district court lacked jurisdiction to enforce it." 21 F.3d at 1388.

[9] "Because Section 502 [of ERISA] authorizes suits for benefits to be brought in federal court only while a collective bargaining contract remains in force, the district court in this case did not have jurisdiction over Heussner's claims in counts four, five and six. These claims were brought pursuant to the terms of a contract (the 1984 Agreement) that had been allegedly superseded and, consequently, could not be 'in force' unless the superseding 1987 Agreement were to be rescinded. Because the collective bargaining contract upon which Heussner based his claims for benefits is not currently in force, the district court did not err in its conclusion that it lacked subject matter jurisdiction over the claims made for benefits under Section 502 of the Employee Retirement Income Security Act." 887 F.2d at 677.

accrued and vested under ERISA[10] nor contractually vested under the 1978 Pension Agreements before they terminated.[11] Yet, without ever concluding that such right was accrued or vested under either ERISA or the 1978 Pension Agreements, the decision below concludes that such a right survived the termination of the collective bargaining agreements and could not be altered by the employer:

> Thus, the [1978 Pension] Agreement did survive its termination, in that it also constituted the sole controlling plan document. Thus, the Plan provisions for no reversion and for distribution in the event of termination survive the [1978 Pension] Agreement's termination.

---

[10] An inchoate interest in pension surplus that might exist upon future termination of a pension plan is not part of an employee's "accrued benefit" under ERISA and therefore cannot be vested. On the contrary, by definition, surplus is the money left over after all accrued and vested pension benefits under the plan have been satisfied. PBGC Op. Ltrs. 89-01 and 85-10; Treas. Reg. § 1.401-2(b)(1); *Nobers v. Crucible Inc. 1975 Salaried Retirement Plan*, 925 F.2d 418, 13 Emp. Ben. Cas. (BNA) 2741 (3d Cir. 1991); *Walsh v. Great Atlantic & Pacific Tea Co.*, 96 F.R.D. 632 (D.N.J.), *aff'd*, 726 F.2d 956 (3d Cir. 1983). Respondents admitted on brief that their claim to the surplus is not even a claim for a "benefit," much less an accrued or vested pension benefit protected by ERISA, saying their "claims, relating to the distribution of excess funds, can by no stretch of language be considered 'claims for benefits.' "

[11] Once again, respondents admitted on brief that they had no right to the surplus under the 1978 Pension Agreements when those agreements terminated in September 1981: "No participant had a right to the surplus increment in 1981."

App. at 20a. The decision below therefore directly conflicts with the decisions of the Sixth Circuit in *Adcox v. Teledyne, Inc.* and *Heussner v. National Gypsum Co.*

In addition, the decision below conflicts with the decisions of many courts of appeals regarding amendment or termination of retiree health or life insurance maintained pursuant to a collective bargaining agreement that terminates. For example, in *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989), an ERISA-covered insurance plan was embodied in a collectively bargained insurance agreement that provided insurance for retirees. When the collectively bargained insurance agreement terminated, however, the employer terminated insurance for retirees. When the retirees sued, the Eighth Circuit held that, since ERISA does not prescribe vesting for welfare benefits and the benefits were not contractually vested before the insurance agreement terminated, the employer was no longer bound by the terminated insurance agreement and was privileged to amend or terminate the insurance plan.

The same two-step analysis has been applied routinely by the courts of appeal in other retiree insurance cases. Where the courts have concluded that no right to continued benefits was provided either statutorily (under ERISA) or contractually (under the terminated collective bargaining agreement), they have harmonized ERISA and the NLRA by holding that the employer was free to amend or terminate the plan after termination of the collective bargaining agreement. Needless to say, those retiree insurance cases would have been decided differently if it were true, as the decision below holds, that an employer is powerless to amend an employee benefit

plan embodied in a collective bargaining agreement after the collective bargaining agreement terminates. The decision below is therefore in conflict with *Anderson v. Alpha Portland Industries, Inc.*, and the other retiree insurance cases which have been decided in favor of the employer.

More broadly, it is easy to see that the decision below is in conflict with every court of appeals decision that recognizes an employer's right to amend an employee benefit plan embodied in a collective bargaining agreement after the collective bargaining agreement terminates and the employer is no longer bound by the NLRA to maintain the status quo. For example, the decision below conflicts with decisions permitting an employer to amend or terminate employee benefit plans embodied in collective bargaining agreements after bargaining to impasse with the union. *See, e.g., Merk v. Jewel Cos., Inc.*, 848 F.2d 761 (7th Cir.), *cert. denied*, 488 U.S. 956 (1988).[12]

And, in the largest view, the decision below directly conflicts with this Court's longstanding jurisprudence that only rights which contractually accrued or vested prior to termination survive the termination of a collective bargaining agreement. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991), *Nolde Bros. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977),

---

[12] Even the "Bible" of plaintiffs-side ERISA litigation, generally representative of the most aggressive claim posture, readily concedes, "The bilateral restrictions on plan amendments inherent in collective bargaining disappear if the collective bargaining agreement expires and the employer, after bargaining to impasse over proposed amendments, unilaterally puts the proposed amendments into effect." S. Bruce, *Pension Claims: Rights and Obligations* 471 (BNA Books, 2d ed. 1993).

Allied Chemical Workers v. Pittsburgh Plate Glass, 404 U.S. 157 (1971). Directly contrary to this Court's holdings under the NLRA, the decision below in effect elevates *the entire collective bargaining agreement* to the status of a contractually vested right that survives the termination of the agreement.

This Court's review is needed to resolve the conflict among the circuits, as well as the conflict with this Court's uniform jurisprudence under the NLRA, created by the decision below as to the continuing effect of a terminated collective bargaining agreement and, more particularly, the ability of the employer to eliminate benefits that have neither accrued nor vested prior to termination of that agreement.

II. BY MISAPPLYING THIS COURT'S DECISION IN *CURTISS-WRIGHT CORP. V. SCHOONEJONGEN*, THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF CONFLICT BETWEEN ERISA AND THE NLRA AND CREATES AN INTOLERABLE BURDEN ON COLLECTIVELY BARGAINED EMPLOYEE BENEFIT PLANS.

The decision below creates an intolerable conflict between ERISA and the NLRA by misapplying the case of *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223 (1995), which focused on the employer's right to amend an employee benefit plan. ERISA section 402(b)(3), 29 U.S.C. § 1102(b)(3), requires every employee benefit plan subject to ERISA to contain "a procedure for amending such plan, and for identifying the persons who have

authority to amend the plan." In *Curtiss-Wright*, the question was whether a brief statement such as "The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan" constituted an adequate amendment procedure under ERISA.

The question arose in *Curtiss-Wright* because, absent an effective amendment procedure, an employee benefit plan might effectively be rendered unamendable.[13] While the Third Circuit held that the simple procedure in the Curtiss-Wright plan was inadequate under ERISA (and therefore that the plan was unamendable), this Court concluded that the procedure was perfectly adequate under ERISA and remanded for consideration of the factual question of whether the procedure set forth in the plan had actually been followed.

The decision below is expressly premised on *Curtiss-Wright*. It holds that the 1978 Pension Agreements governed the plan, that the 1978 Pension Agreements lacked any procedure for amendment, and therefore, under *Curtiss-Wright*, that the Employer was powerless to amend the plan after the 1978 Pension Agreements terminated, thus endowing those terminated collective bargaining agreements with eternal life contrary to the NLRA. The conflict thus created between ERISA and the NLRA is entirely unnecessary, however, and itself violates ERISA.

---

[13] As this Court said, "for a plan not to have such a procedure [a valid amendment procedure] would risk rendering the plan forever unamendable under standard trust law principles. See Restatement (Second) of Trusts § 331(2) (1957)." Slip Op. at 16.

It is true, of course, that collective bargaining agreements generally do not provide a procedure for amendment. This is because collective bargaining agreements are contracts. In a contract, the parties need not reserve in the document any power to amend; as a matter of law, they are privileged to amend at any time by mutual agreement. 1A A. Corbin, *Corbin on Contracts* § 186 (1963); *Restatement (Second) of Contracts* § 89(a) (1979). As a result, collective bargaining agreements – even those that embody employee benefit plans – typically are silent as to amendment. For obvious reasons, virtually none permit unilateral amendment by the employer.

Instead, as explained above, the NLRA creates the context of law within which collective bargaining agreements are created, amended and terminated. Conflict between ERISA and the NLRA can be avoided entirely if the "procedure for amending such plan" is understood, in the case of a plan embodied in a collective bargaining agreement, as the regulatory framework of the NLRA. Thus, while a collective bargaining agreement is in force, under the NLRA the parties may amend it at any time by mutual consent. After it terminates, under the NLRA the employer may amend it in any way that does not abridge rights that accrued and vested while it was in effect. In this way, if the rules of the NLRA are recognized as the procedure for amending the plan, ERISA (based on the law of trusts) and the NLRA (based on the law of contracts) are harmonized.

Harmony between ERISA and the NLRA is not merely desirable, however; it is expressly required by ERISA. While Congress sweepingly pre-empted *state* law relating to employee benefit plans, as this Court has

repeatedly held, it specifically provided that ERISA should not be construed to impair any other *federal* law:

> Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law.

ERISA sec. 514(d), 29 U.S.C. § 1144(d).[14] Needless to say, by giving eternal life to terminated collective bargaining agreements, the decision below impairs the NLRA and therefore directly violates ERISA. There is no indication in ERISA or its history that Congress intended the trust-based rules of ERISA to be interpreted in such a way as to abrogate the settled contract-based rules of the NLRA.

By overlooking the framework of law supplied by the NLRA as the "procedure for amending such plan," the decision below not only misapplies *Curtiss-Wright*, thus impairing the NLRA and violating ERISA, but creates the absurd and intolerable result that employee benefit plans embodied in the typical collective bargaining agreement are *unamendable* after the collective bargaining agreement terminates and the collective bargaining relationship ends. Indeed, if the decision below were faithfully applied, it would produce the same absurd result with regard to *extant* collective bargaining agreements. Thus, if a collective bargaining agreement embodied an employee

---

[14] The exceptions are not relevant here. They concern repeal of the predecessor Welfare and Pension Plans Disclosure Act of 1958 and authorization of additional personnel in the Department of Labor.

benefit plan and (as usual) lacked a procedure for amendment, presumably even the *employer and union acting by mutual consent* would be powerless to amend it under ERISA – yet a further repudiation of longstanding statutory and case law under the NLRA. *See* NLRA section 8(d) (expressly contemplating mid-term modifications and setting conditions therefor), *NLRB v. Sands Manufacturing Co.*, 306 U.S. 332 (1939).

This case clearly illustrates the mischief that follows from the erroneous conclusion that employee benefit plans, previously embodied in collective bargaining agreements, cannot be amended after the collective bargaining agreement terminates. In this case, the pension plan provided for reversion of surplus assets to the Employer from its adoption in 1950 until 1963. During a period of collective bargaining from 1963 to 1981, the Employer agreed not to take back its contributions if the plan terminated. But after the last collective bargaining agreement terminated, and the Employer was no longer subject to any contractual agreement regarding disposition of the surplus, the Employer amended the pension plan to reinstate the plan to its original terms.

Reinstatement of the original terms of the plan was clearly proper under the NLRA, because the Employer no longer had a contractual obligation to do otherwise and any inchoate interest of the employees in a share of the surplus upon eventual termination of the plan was neither accrued nor vested contractually when the 1978 Pension Agreements terminated. Reinstatement of the original terms of the plan was also proper under ERISA, because an inchoate interest in the surplus is not an accrued benefit protected by the vesting provisions of

ERISA.[15] Yet the decision below, in contravention of the NLRA and contrary to every other court of appeals that has considered the question, denied the Employer the right to amend the pension plan to restore it to its original condition after the 1978 Pension Agreements terminated, expressly holding that the 1978 Pension Agreements control after their termination.[16]

The question presented here is important for the broad range of employee benefit plans embodied in collective bargaining agreements.[17] Needless to say, if those

---

[15] Of course, employees *did* have a vested right to their accrued benefits under the plan – their regular monthly pensions calculated in accordance with the benefit formula in the plan – and those rights were all fully satisfied upon termination of the plan, as required by ERISA.

[16] This Court has previously been called upon to harmonize ERISA and collective bargaining under federal labor law and has always succeeded. *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), *UMW Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982), *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 539 (1988). Notably, in *Robinson*, this Court held that it was not a breach of fiduciary duty under ERISA to observe the terms of a collective bargaining agreement that did not violate any substantive provision of ERISA. The same should apply here, where the employer was freed from any collectively bargained obligation by observing the *termination* provision of a collective bargaining agreement.

[17] According to the latest tabulation of annual reports, there are over 14,000 private, single-employer pension plans that are maintained pursuant to collective bargaining agreements. U. S. Department of Labor, *Abstract of 1992 Form 5500 Annual Reports* 9, 59 (1996). While published statistics are not available, there are undoubtedly many times that number of welfare plans maintained pursuant to collective bargaining agreements.

plans are unamendable because the collective bargaining agreement lacks an express amendment provision, then amendments adopted by unions and employers in triennial collective bargaining have been invalid ever since ERISA was enacted in 1974, thus casting the terms of the plans into doubt and permitting participants to sue for any benefits that have been reduced or eliminated by those amendments. In this respect, this case resembles both *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223 (1995), and *Lockheed Corp. v. Spink, cert. granted*, 116 S.Ct. 806 (1996), both of which involved the realistic threat of wholesale invalidation of previous amendments to employee benefit plans.

Going forward, there is a substantial question whether plans embodied in collective bargaining agreements, if they are unamendable for lack of an express amendment provision, can even be amended to insert an amendment provision. If not, employers will in effect have guaranteed perpetual benefits where they reasonably believed they had guaranteed benefits only for the life of the collective bargaining agreement, imposing an unexpected burden (and, we believe, a burden wholly unintended by Congress) that can only lead to reduction or elimination of employee benefit plans. Even if the plans can be amended to insert an amendment provision, the change will require the consent of the union, which will likely exact a steep price for "giving up a right" that employees would otherwise enjoy, once again imposing a burden that Congress did not intend and employers could not have expected. Ironically, the burdens imposed by the misguided decision below will have the effect of discouraging employee benefit plans, directly contrary to

the purpose of ERISA to promote and expand employee benefits.

Nor can the problem be contained within the Third Circuit. Given the interstate reach of many employee benefit plans and the liberal venue and nationwide service of process provisions of ERISA, all it takes is one participant in the Third Circuit to institute a class action on behalf of all participants nationwide.[18] Plans all across the United States will be exposed to egregious forum-shopping if clever class-action counsel can identify even one employee or retiree residing in Pennsylvania, New Jersey, Delaware or the Virgin Islands – not a difficult task with respect to most companies of national stature.

CONCLUSION

This Court's review is urgently needed to resolve the conflict among the circuits as to the amendability of an employee benefit plan, embodied in a collective bargaining agreement, after the collective bargaining agreement terminates. This Court's review is further justified by the important question of conflict between ERISA and this Court's jurisprudence under the NLRA created by the decision below, in contravention of the express intent of Congress that ERISA be applied harmoniously with other federal law, and the absurd and intolerable consequence

[18] ERISA effectively permits an action to be brought in any district where the participant resides, on the ground the breach occurred there; this is all the more true for retirees, who may retire to any circuit regardless of where their former employer conducted business. ERISA sec. 502(e)(2), 29 U.S.C. § 1132(e)(2).

of the decision below that terminated collective bargaining agreements are given perpetual binding effect in their entirety.

Respectfully submitted,

HOLLIS T. HURD
(Counsel of Record)
THE BENEFITS DEPARTMENT
900 Fifth Avenue
Pittsburgh, PA 15219
(412) 471-9924

Of Counsel:
WILLIAM T. MARSH
SPANG & COMPANY
P. O. Box 751
Brugh Avenue
Butler, PA 16001
(412) 287-8781

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-3218 and 95-3248

JEAN E. BRYTUS; JOHN LAZOR; WHEAT GIACOBBE; JOHN STANKO, STEVE KOTYK; ALEX WARCHOLAK, and others similarly situated; JOHN KOTYK; SAM BORIELLE, JR., and others similarly situated

v.

SPANG & COMPANY; UNION NATIONAL BANK; PENSION PLAN, for Former Bargaining Unit Employees of Fort Pitt Bridge and Electric Weld Divisions at Canonsburg, PA, Plant;

(D.C. Civil No. 88-cv-02548)

EDWARD J. GOLONKA, and others similarly situated

v.

SPANG & COMPANY; PENSION PLAN FOR FORMER BARGAINING UNIT EMPLOYEES FORT PITT BRIDGE AND ELECTRIC WELD DIVISION AT CANONSBURG, PA, PLANT

(D.C. Civil No. 91-cv-01041)

SPANG & COMPANY AND THE PENSION PLAN FOR FORMER GARGAINING [*sic*] UNIT EMPLOYEES OF FORT PITT BRIDGE and ELECTRIC WELD DIVIDEION [*sic*] OF CANONSBURG, PA, PLANT,

Appellants in No. 95-3218

(Amended per the Clerk's order of 8/29/95)

JEAN E. BRYTUS; JOHN LAZOR; WHEAT GIACOBBE; JOHN STANKO, STEVE KOTYK; ALEX WARCHOLAK, and others similarly situated; JOHN KOTYK; SAM BORIELLE, JR., and others similarly situated

v.

SPANG & COMPANY; UNION NATIONAL BANK; PENSION PLAN, for Former Bargaining Unit Employees of Fort Pitt Bridge and Electric Weld Divisions at Canonsburg, PA, Plant;

(D.C. Civil No. 88-cv-02548)

EDWARD J. GOLONKA, and others similarly situated

v.

SPANG & COMPANY; PENSION PLAN FOR FORMER BARGAINING UNIT EMPLOYEES FORT PITT BRIDGE AND ELECTRIC WELD DIVISION AT CANONSBURG, PA, PLANT

(D.C. Civil No. 91-cv-01041)

JEAN E. BRYTUS, JOHN LAZOR, WHEAT GIACOBBE, JOHN STANKO, STEVE KOTYK, ALEX WARCHOLAK and others similarly situated; JOHN KOTYK, SAM BORIELLE and others similarly situated, EDWARD J. GOLONKA, and others similarly situated,

Appellants in No. 95-3248

(Amended Per the Clerk's order of 8/29/95)

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 88-02548)
District Judge: Honorable Donald J. Lee

Argued January 29, 1996

BEFORE: GREENBERG, NYGAARD, and LAY,*
Circuit Judges

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the orders of the district court entered September 6, 1994, and March 30, 1995, be and are hereby affirmed.

The parties will bear their own costs of these appeals.

BY THE COURT:

/s/ Illegible
Circuit Judge

ATTEST:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: FEB 7 1996

---

* Honorable Donald P. Lay, Senior Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	)	Civil Action Nos. 88-2548
	)	90-1805, 91-1041
SPANG & COMPANY	)	JUDGE DONALD J. LEE/
LITIGATION	)	MAGISTRATE JUDGE
	)	BENSON

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

At issue in these consolidated cases is the proper disposition of "left-over" or surplus funds from a retirement account governed by the provisions of the Employee Retirement Income Security Act ("ERISA"). The first action filed, Civil Action No. 88-2548, was filed by six participants in the retirement fund against Spang & Company ("Spang") and the Pension Plan. A second action was filed by two more claimants at Civil Action No. 89-579. The second action was consolidated with the first, and 89-579 was closed by order of court, and plaintiffs there were joined with plaintiffs at the earlier number. Spang filed a lawsuit at Civil Action No. 90-1805 against the United Steelworkers of America, AFL-CIO-CLC ("the Union"), alleging breach of contract for encouraging the participant litigation. Finally, at Civil Action No. 91-1041, another Plan participant filed suit against Spang and the Pension Plan. Presently before the court are several motions. First, with respect to 88-2548, it

is respectfully recommended that the motion for summary judgment filed by plaintiffs (Docket #28) be granted; that Defendants' Motion to Disqualify Certain of Plaintiffs' Attorneys (Docket #31) be denied; that Defendants' Motion for Judgment on the Pleadings or for Partial Summary Judgment on Count II of Plaintiffs' Complaint (Docket #34) be denied; that Defendants' Motion to Strike Plaintiffs' Demand for Jury Trial (Docket #35) be denied as moot; that Defendants' Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment as to Plaintiffs' Requests for Extracontractual Damages and Class Wide Relief (Docket #36) be granted; and that Defendants' Motion for Summary Judgment on Count I of Plaintiffs' Complaint be denied. It is further recommended that the motion to dismiss filed by the Union at 90-1805 (Docket #6) be granted, and that the motion to maintain class action and for certification of class at 91-1041 (Docket #8) be denied.

II. REPORT

This case has become much more complex than it need to have, partly due to the manner in which it has been litigated (which has resulted in a number of suits instead of one, and a number of related motions), and partly due to delays which were caused in large part by the court.[1] In any event, there are dispositive as well as

---

[1] By this comment, I do not mean to imply that any such delay was intentional or even entirely avoidable. This case has, however, languished at various times due to transfers from judge to judge, and, after a report and recommendation addressing all of the outstanding motions was filed, was subject

non-dispositive motions presently pending before the court in these consolidated cases. The motions have been briefed, rebriefed, and argued. The matters are now ripe for disposition.

FACTUAL BACKGROUND

Plaintiffs[2] at 88-2548 and 91-1041 are persons entitled to receive benefits under a pension plan (the "Plan") sponsored and administered by the Plan's sole trustee, Spang, for the benefit of employees at Spang's Fort Pitt Bridge and Electric Weld plants in Canonsburg, Pennsylvania. The Plan was established and operated pursuant to a series of collective bargaining agreements between Spang and the Union between 1963 and 1981, when the last agreements expired and the plants were closed.[3] From 1963 through 1981, the Pension Agreements entered into between the parties provided for defined benefits,

---

to further delay due to the *sua sponte* recusal of Judge (then Magistrate Judge) Lancaster. Finally, this matter has not been dealt with by my chambers with the dispatch I would have liked. In all of the above instances, the delay has not been without reason. Nonetheless, litigants ought to expect more prompt treatment of even a complex matter such as this. For my own part in this history of delay, I offer my sincere apologies.

[2] Although Spang is also a "plaintiff" at a consolidated case, 90-1805, I will hereafter refer to the pensioners as "plaintiffs" for purposes of continuity.

[3] Separate agreements were entered into for each of the plants, although the provisions of each agreement are identical. Hence, there will be no differentiation made between them for purposes of this report.

i.e., that employees would be entitled to a pension calculated by a formula contained in the Agreements. Funding for the Plan from 1963 through 1976 was based upon a specified contribution by Spang for each hour worked by each employee. This method changed in 1976 when the parties agreed that Spang would fund the Plan in accordance with ERISA's provisions.

In each of the Pension Agreements entered into between the Union and Spang beginning in 1963, and including the last agreement in 1978, the following provision appeared:

> The contributions made by the Company to the Pension Fund may not under any circumstances revert to the Company. If this Pension Plan shall terminate, the funds in the Pension Fund shall be used in the manner provided in Article IX of this Agreement.

In 1981, prior to the time that the plants were closed, Spang and the Union met to settle differences concerning the manner of the closing and the wages and other benefits due to union members. The result was a "Shutdown Agreement" signed by the Union and Spang on October 13, 1981, and made effective as of October 1, 1981. With respect to pensions, the Shutdown Agreement provides as follows:

> 1. Participants.
>
> All eligible participants will receive the pension benefits to which they are entitled as described in the terminated Pension Agreements, based on the Continuous Service accrued through September 30, 1981, provided, however, that any participant terminated under paragraph 2 above

> shall continue to accrue Continuous Service, for pension purposes only, until the earliest of (a) retirement, (b) the second anniversary date after the date the participant commenced his most recent layoff, (c) employment by a Division or subsidiary of Spang & Company, or (d) September 30, 1983.
>
> 2. Retired Participants.
>
> All retired participants will continue to receive the pension benefits to which they are entitled.

Additional provisions which related to the pension benefits, and are not relevant to this dispute, provided for the revocation of certain applications for early retirement and a waiver of Spang's rights under the Pension Agreements to deduct severance pay from pension payments.

Also part of the Shutdown Agreement is the following release:

> 6. The benefits set forth in this Agreement shall be in complete discharge of any and all claims of the Union and of employees under the terminated basic Labor Agreements dated as of October 1, 1978 and all ancillary agreements related thereto (e.g. the terminated Insurance Agreements and the terminated Pension Agreements), and receipt and acceptance of such benefits by an employee shall constitute a complete release of any and all claims, including any pending grievances, file [sic] or unfiled. The Company may request each such former employee to sign an individual acknowledgement of this paragraph.

Individual copies of this release were distributed to employees. On November 18, 1981, the board of directors

of Spang adopted an amended and restated Plan which added a provision that any surplus in the pension fund after plan termination would be returned to the employer. No notice was sent to the pension participants that this amendment had been made.[4]

In early 1988, Spang again amended the Plan. Spang thereafter decided to terminate the Plan, and undertook to comply with various requirements for accomplishing this task. When approval was given by regulatory agencies, the administrator of the Plan purchased group annuity contracts which would provide each of the participants benefits based upon the formula set forth in the Plan. The surplus funds were then returned to Spang pursuant to the amendment to the Plan adopted in 1988. These lawsuits ensued.

Plaintiffs allege three causes of action against Spang. The first seeks relief pursuant to Section 301 of the Labor Management Relations Act ("LMRA") for alleged violations of the terms of the 1978 agreement. The second, filed pursuant to Section 502 of the Employee Retirement Income Security Act ("ERISA"), alleges a violation of the Plan. Finally, the third cause of action is for a breach of fiduciary duties pursuant to Section 404 and 502 of ERISA.

Spang has responded with the motions listed above, and also with a lawsuit against the Union and various of

---

[4] I understand Spang's assertions that its intention to make such an amendment had been communicated to the Union prior to the negotiation of the Shutdown Agreement. For reasons discussed later in this report, however, such evidence is irrelevant.

the Union's agents and officers. Spang seeks recovery of the costs and fees it has expended in litigating this action on the theory that the Union bargained away plaintiffs' rights to the surplus funds in the Pension Fund pursuant to the 1981 Shutdown Agreement. The Union has filed a motion to dismiss that lawsuit.

LEGAL STANDARDS

Summary judgment is appropriate if, drawing all inferences in favor of the non-moving party, " . . . the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's case, and for which that party will bear the burden of proof at trial. *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986). The moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. Once that burden has been met, the non-moving party must set forth ". . . . specific facts showing that there is a *genuine issue for trial* . . . " or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. *Matsushita Electric Industrial Corp. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Where the terms of a contract are clear and unambiguous, the court must rely on the contract language as evidencing the intent of the parties. *Langer v. Monarch Life Ins. Co.*, 879 F.2d 75, 81 (3d Cir. 1989). The court ought to give the language in a contract its plain and accepted meaning. *Intern. Broth. of Boilermakers v. Local Lodge D504*, 866 F.2d 641, 645 (3d Cir.1989).

1. SPANG'S MOTIONS – LIMITATIONS, WAIVER AND EXHAUSTION

THE LMRA CLAIMS

Spang seeks summary judgment with respect to each of plaintiffs' claims on the basis of the statute of limitations, and with respect to the LMRA claim on the basis of waiver. Plaintiffs' LMRA claim is that Spang breached the 1978 collective bargaining agreement by taking the surplus funds. Spang first asserts that the Union bargained away the right to rely upon the agreement's non-reversion clause in entering into the 1981 Shutdown Agreement. Voluminous evidence has been presented concerning the negotiations leading up to the Shutdown Agreement itself. That evidence is, however, irrelevant in the face of unambiguous language in the contract which provides that it is to be interpreted without resort to negotiation history.

In reviewing the agreement itself, it is apparent that the parties did not reach an agreement with respect to the surplus funds. Those funds are not mentioned in any part of the agreement. Spang argues, however, that the general release of all "claims, . . . filed or unfiled" bars the plaintiffs from asserting any claim under the Pension

Agreement. No claim to surplus funds, however, had been filed or even existed at the time that the Shutdown Agreement was signed. In fact, such a claim would only become ripe should the Plan be terminated and the surplus funds be used in a manner inconsistent with the Pension Agreement, or, perhaps, when an amendment to the Plan was adopted providing for reversion. Neither of these eventualities had occurred at the time the Shutdown Agreement was executed. Further, the Shutdown Agreement specifically provides that all participants "will receive the pension benefits to which they are entitled as described in the terminated Pension Agreements. . . . " It is undisputed that the Pension Agreements in question provide that Spang's contributions to the Fund will "under no circumstances" revert to Spang, and that upon termination all funds will be distributed in accordance with the provisions of the Plan. Thus, one of the "benefits" pursuant to the Pension Agreements is the receipt of any surplus funds available upon termination of the Plan. In short, far from bargaining away the right to surplus funds, the Union obtained for its members an additional promise to apply the terms of the terminated Pension Agreements, including the language concerning surplus funds. Thus, the existence of the Shutdown Agreement is not a bar to the plaintiffs' claims under the LMRA.[5]

---

[5] As an alternative argument in support of their position, plaintiffs note that a lawsuit was filed on October 6, 1981, after the Union was given a copy of a proposed amended Plan which included provisions for reversion of surplus funds to Spang upon termination. Negotiations begun after initiation of the suit resulted in the Shutdown Agreement, and settlement of the suit. At a hearing on the proposed settlement, the Union's attorney

Spang next argues that plaintiffs' claims under the LMRA are barred by the statute of limitations. In this respect, Spang relies upon *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), for the proposition that the six-month statute from the National Labor Relations Act ("NLRA") applies. In *DelCostello*, however, the court was faced with a hybrid cause of action alleging both a breach of the collective bargaining agreement against the employer and a breach of the duty of fair representation against the union. Here, the only claim is

---

stated his belief that the company would keep the existing Plan in effect, and that the issue of reversion of the surplus benefits would become ripe when the Plan was terminated. Spang's attorney, given an opportunity to respond, stated that Spang could not ask participants to waive their rights "*in futuro*," and that the release contained within the Shutdown Agreement did not apply to those rights. Plaintiffs assert that these representations in open court estop Spang from relying upon the Shutdown Agreement as a waiver of plaintiffs' rights under the Pension Agreement. I agree. Spang's attorney made representations to the court in furtherance of Spang's interest in garnering court approval of the settlement of a lawsuit, and in direct response to the court's concern that the Plan's participants not be prejudiced by settlement. Spang now argues that its attorney did not necessarily mean that the Shutdown Agreement did not address the issue of surplus funds, or that a waiver of rights with respect to such funds was not accomplished by the agreement. It distresses me that such an argument has been presented to this court. In presenting such an argument, Spang has needlessly consumed the time and efforts of this court and of opposing counsel, even though the position taken hardly survived its utterance. I suggest that Spang's present counsel reread the transcript of the 1981 hearing and should, perhaps, consider the duty of candor owed to opposing counsel and the court before making such arguments in the future.

against the employer for a breach of the collective bargaining agreement. Thus, the six-month period does not apply.

Since the LMRA does not provide a statute of limitations, and this is not a case governed by *DelCostello*, the most analogus state limitations period is applied. *Grasty v. Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC*, 828 F.2d 123 (3d Cir.), *cert. denied*, 484 U.S. 1042 (1987) (Pennsylvania statute of limitations for breach of contract applied to claims by union members against union for breach of union constitution); *Hotel Employees and Restaurant Employees International Union Welfare Fund v. Pub of New Jersey*, 744 F.Supp. 91 (D.N.J. 1990) (New Jersey six-year statute of limitations for contract actions applicable to LMRA action for payment of delinquent pension fund contributions). Plaintiffs assert that the most closely analogous state statute of limitations is that for breach of contract, 42 Pa.C.S. § 5525, which is four years from the time that a claimant first knows that the breach occurred.

In *Gluck v. Unisys Corp.*, 960 F.2d 1181 (3d Cir. 1992), the court adopted Pennsylvania's limitations period for breach of contract for use with respect to ERISA claims for future benefits. The *Gluck* court distinguished earlier decisions which found that ERISA and LMRA claims for payment of delinquent employer contributions were governed by the three-year limitations period set forth in Pennsylvania's Wage Payment and Collection Law. *Id., citing Vernau v. Vic's Market Inc.*, 896 F.2d 43, 45 (3d Cir. 1990). The analogy between delinquent payments and

"wages" relied upon in *Vernau* was found to be "inoperable when ERISA claims are based upon statutory violations, plan interpretation and future benefits." *Gluck*, at 1181. The *Vernau* analogy to "wages" also fails here, since the contract provision relied upon does not set forth a specific benefit to be paid, but instead provides that contributions will not, under any circumstances, revert to Spang. The claim that Spang breached this provision of the Pension Agreements most closely resembles a claim for breach of contract, and is governed by Pennsylvania's four-year statute of limitations, which begins to run "when a claimant first knows that the benefit has been infringed or removed." *Gluck*, at 1181.

The court must still determine, however, when the plaintiffs first became aware of the breach of contract. Spang argues that any statute of limitations must run from the time of the November, 1981 amendment of the Plan. Plaintiffs have presented uncontested evidence, however, that Spang never informed any of the Plan participants that the amendment had been made, or of its import.[6] Further, the amendment pursuant to which Spang actually took the surplus funds was adopted in 1988, and Plan participants were notified of that amendment in June, 1988, when Spang informed them that the termination of the Plan would have no effect on their

---

[6] Spang contends that it informed the Union in September, 1981, that it intended to amend the Plan to provide for reversion of surplus funds. Knowledge of intent to make changes is not equivalent to knowledge of the actual amendment, particularly since no amendment was made until, at the earliest, November, 1981, and the amendment relied upon by Spang was not made until 1988.

pension benefits (i.e., that there would not be an increase due to the distribution of any surplus funds). Therefore, the earliest that the statute of limitations could begin to run in this case is June, 1988, since that is when the participants were first informed of an actual amendment which purported to vest in Spang a right to reversion of excess funds. The plaintiffs' LMRA claims, having been filed within four years of June, 1988, are, therefore, timely.

Spang argues that the Supreme Court has determined the issue of when a cause of action accrues under federal labor law based upon the amendment of a pension plan. Spang relies upon *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), which was a case involving the limitations period set forth in § 706(e) of Title VII. The court was interpreting the specific statutory language in question, and did not, as suggested by Spang, purport to decide the issue of accrual of claims in all labor cases. Hence, *Gluck* is controlling, and it is not inconsistent with *Lorance*.[7]

ERISA BENEFITS CLAIM

Spang also asserts that the second count in each of the complaints filed, seeking payment of an ERISA benefit in the form of the surplus funds, is time-barred. Once

---

[7] Spang notes that the Court of Appeals for the Seventh Circuit has interpreted *Lorance* as applying in a situation where an early retirement plan is adopted which is at odds with a collective bargaining agreement. *EEOC v. City Colleges of Chicago*, 944 F.2d 339 (7th Cir. 1991). That case is not the law of this circuit, nor is it directly on point.

again, this claim, which is predicated upon allegations that Spang failed to comply with the Plan requirements that it not take any surplus funds, most closely resembles a claim in contract, and is governed by the same four-year statute as the LMRA claim. *Gluck, supra.* The same analysis applies, and Spang's motion for summary judgment with respect to this claim must also be denied.

ERISA FIDUCIARY CLAIM

The last claim raised by plaintiffs is that, by unilaterally amending the Plan to permit reversion of the Plan's surplus funds, Spang has violated its fiduciary duty under ERISA. The applicable statute of limitations in this instance is three years from actual knowledge of the facts and law necessary to inform a plaintiff of the existence of a cause of action, or six years from the adoption of the allegedly improper amendment to the Plan. *See, IUE v. Murata Erie North America, Inc.*, 980 F.2d 889 (3d Cir. 1992). Spang asserts that the six-year period is a statute of repose which is unaffected by tolling principles, and that it began to run in November, 1981, when Spang asserts it first amended the Plan to provide for reversion of surplus funds. Plaintiffs reply that tolling principles apply to the six-year statute, and that the amendment pursuant to which the action was taken was adopted in 1988, not 1981.

I find it unnecessary to address the issue of tolling. The amendment of the Plan which is challenged here occurred in 1988. Hence, if the date of the amendment itself is the starting point for limitations purposes, that period did not start until the final amendment of the Plan

in 1988, which was the amendment pursuant to which Spang claimed reversion of the funds. The claim for breach of fiduciary duty survives Spang's motion for summary judgment.[8]

EXHAUSTION OF PLAN REMEDIES

In an alternative to its limitations argument with respect to the ERISA claims, Spang argues that plaintiffs should be required to submit their dispute to the Plan prior to instituting legal proceedings. The same argument was raised in *Delgrosso v. Spang*, 769 F.2d 928 (3d Cir.), *cert. denied*, 476 U.S. 1150 (1985). There, the court held that the dispute was more fundamental than a mere dispute concerning benefits, and that exhaustion was not required when the question was the employer's power to amend the Plan in a manner inconsistent with the Plan Agreement. The same result applies here. Although the issue is, ultimately, whether plaintiffs are entitled to increased benefits, the underlying dispute concerns Spang's authority to amend the Plan. Hence, intra-plan review is not required prior to litigation.

---

[8] This result would also apply if the 1981 amendment were con sidered as the start of the six-year period. A material change in the terms of an ERISA plan requires notice to individual participants. 29 U.S.C. § 1022(a)(1). The limitations period is extended "in the case of fraud or concealment" and does not begin to run until "the date of discovery of such breach or violation." 29 U.S.C. § 1113. Spang's admitted failure to provide *any* notice to participants of the actual adoption of the 1981 amendment can be seen as nothing other than concealment. Discovery occurred, at the earliest, in 1988. Again, the action for fiduciary breach is timely.

2. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs assert that they are entitled to summary judgment with respect to their right under the 1978 Pension Agreement, which plaintiffs assert comprises the Pension Plan. Plaintiffs seek a ruling that they are entitled to the surplus funds which existed at the time of the Plan's termination. Plaintiffs' argument is that the Pension Agreement is the sole document which evidences the Plan, and that the provisions forbidding Spang from taking reversion of its contributions along with the direction that all funds in the Plan at termination be distributed in accordance with Article IX of the Agreement entitle plaintiffs to the surplus funds.

Spang counters that the Pension Agreement terminated in 1981, and that its provisions are no longer applicable. It is further asserted that the Plan was amended in 1981 and 1988, and that those provisions govern. Spang's final argument is that, even if the Plan does provide that contributions may not revert to Spang, that prohibition does not apply to contributions made prior to 1963, when the non-reversion provision was first inserted into the Pension Agreements between Spang and its employees.

First, although the Pension Agreement did terminate in 1981, it was, at the time of termination, the sole governing plan document. In fact, the Agreement identifies itself as the Plan. Further, Spang has not produced a copy of any document which existed prior to termination of the Agreement which purports to be the Plan or a portion

thereof.[9] *See, Delgrosso, supra.* Thus, the Agreement did survive its termination, in that it also constituted the sole controlling plan document. Thus, the Plan provisions for no reversion and for distribution in the event of termination survive the Agreement's termination.

Spang's attempts to amend the Plan in November, 1981, and June, 1988, must necessarily fail. In *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d Cir, 1994), the court found that an ERISA plan may not be amended unless the plan provides a specific procedure for amendment. Here, the Plan, as evidenced by the sole governing document, does not provide for amendment, and certainly not for unilateral amendment by Spang. Thus, any proposed amendments in 1981 and 1988 are invalid.

Finally, Spang asserts that the Plan provisions do not apply to contributions made prior to 1963, when the non-reversion provision was adopted. Spang purports to have evidence in the nature of accounting of the Plan which it maintains will establish that the surplus funds in the Plan are traceable to funds contributed by Spang's predecessor prior to 1963. The reversion provision, however, does not differentiate between contributions made by Spang's predecessor prior to 1963, and those made by Spang after 1963. The provision is broadly written and means what it

---

[9] The only "Plan" document which Spang produces is a version of the Plan which includes the amendments adopted in November, 1981, which Spang declared to be "effective October 1, 1978." This document did not come into existence until after the 1978 agreements terminated, and the Shutdown Agreement was executed. This is not a "controlling plan document" for purposes of ERISA.

says, "The contributions made by the Company may not under any circumstances revert to the Company." Hence, there is no basis in the Plan for permitting the type of "tracing" proposed by Spang.

It remains, then, to determine if the provisions in question entitle plaintiffs to summary judgment. Indeed, a reading of the Plan establishes that Spang may not retain the surplus. Further, the Plan also provides that, upon termination, the funds in the Plan shall be distributed in accordance with Section IX. That section provides for distribution of plan funds to participants. Although surplus funds are not specifically addressed therein, reading Section IX in concert with the non-reversion provision leads to the inescapable conclusion that the surplus funds must be distributed to the participants in the fund. In any event, reversion to Spang is certainly not permissible. Summary judgment is appropriate in this case.

EXTRA-CONTRACTUAL AND EXEMPLARY RELIEF

Spang is entitled to relief in the nature of striking plaintiffs' claims for extra-contractual and exemplary relief, since neither type of relief is available under the LMRA or ERISA. *Shultz v. Teledyne, Inc.*, 657 F.Supp. 289 (W.D.Pa. 1987).

CLASS CERTIFICATION

Also pending is plaintiffs' motion for class certification at 91-1041. The court has already denied class certification to plaintiffs at the prior actions due to untimely

filing of the motion for certification. Although the motion is timely at 91-1041, it ought to be denied since certification is not necessary. The relief in this case is enforcement of the terms of the Plan. That necessarily includes securing a benefit to the members of the proposed class, which is limited to participants in the Plan. The motion ought to be denied.

MOTION TO DISQUALIFY PLAINTIFFS' ATTORNEYS

Also pending is a motion filed by Spang to disqualify certain of plaintiffs' attorneys. It is asserted that these attorneys are either presently, or were formerly employed by the Union, and that, if they were not representing plaintiffs, plaintiffs would also have filed an action against the Union for bargaining away their rights to the pension surplus pursuant to the Shutdown Agreement. The Union has not been sued by the Plan participants. Further, the Shutdown Agreement does not purport to address the issue of the surplus pension benefits. This motion ought to be denied, since no conflict of interests exists.

3. THE UNION'S MOTION TO DISMISS AT 90-1805

Spang's allegations at this lawsuit are that the Union breached the Shutdown Agreement by sponsoring this lawsuit when the issue of surplus pension funds was addressed by that Agreement. Since this court has already determined that the Shutdown Agreement did not address the issue of surplus funds, Spang cannot

establish a breach of the agreement by the Union, and the Union is entitled to judgment at 90-1805.

CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that the motion for summary judgment filed by plaintiffs at 88-2548 (Docket #28) be granted; that Defendants' Motion to Disqualify Certain of Plaintiffs' Attorneys at 88-2548 (Docket #31) be denied; that Defendants' Motion for Judgment on the Pleadings or for Partial Summary Judgment on Count II of Plaintiffs' Complaint at 88-2548 (Docket #34) be denied; that Defendants' Motion to Strike Plaintiffs' Demand for Jury Trial at 88-2548 (Docket #35) be denied as moot; that Defendants' Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment as to Plaintiffs' Requests for Extracontractual Damages and Class Wide Relief at 88-2548 (Docket #36) be granted; and that Defendants' Motion for Summary Judgment on Count I of Plaintiffs' Complaint at 88-2548 be denied. It is further recommended that the motion to dismiss filed by the Union at 90-1805 (Docket #6) be granted, and that the motion to maintain a class action and for certification of class at 91-1041 (Docket #8) be denied.

In accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(1)(B) and (C), and Rule 4 of the Local Rules

for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report.

/s/ Kenneth J. Benson
KENNETH J. BENSON
UNITED STATES
MAGISTRATE JUDGE

Dated: June 30, 1994

cc: Kathryn L. Simpson, Esquire
Grogan, Graffam, McGinley
& Lucchino, P.C.
Three Gateway Center, 22nd Floor
Pittsburgh, PA 15222

William T. Payne, Esquire
Schwartz, Steinsapir, Dohrmann
& Sommers
3580 Wilshire Boulevard
Suite 1820
Los Angeles, CA 90010-2594

Hollis T. Hurd, Esquire
The Benefits Department
900 Fifth Avenue
Pittsburgh, PA 15219

Kevin P. Lucas, Esquire
Manion, McDonough & Lucas, P.C.
600 Grant Street
Suite 882
Pittsburgh, PA 15219

P. Jerome Richey, Esquire
Buchanan, Ingersoll P.C.
5800 USX Tower
600 Grant Street
Pittsburgh, PA 15219

Richard E. Gordon, Esquire
Grossinger, Gordon & Vatz
1000 Law & Finance Building
Pittsburgh, PA 15219

Virginia A. Seitz, Esquire
Robert M. Weinberg, Esquire
Bredhoff & Kaiser
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036

Daniel P. McIntyre, Esquire
40 Old Mill Road
Falmouth, ME 04105

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	)	Civil Action Nos.
SPANG & COMPANY LITIGATION	)	88-2548, 90-1805, 91-1041

MEMORANDUM ORDER

On January 22, 1993, this case was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(A) and (B), and Rules 3 and 4 of the Local Rules of Magistrates.

The Magistrate Judge's Report and Recommendation, filed on June 30, 1994, recommended the following:

(1) Motion for Summary Judgment filed by plaintiffs at Civil Action No. 88-2458 [*sic*] (Document No. 28) be granted;

(2) Defendants' Motion to Disqualify Certain of Plaintiffs' Attorneys at Civil Action No. 88-2548 (Document No. 31) be denied;

(3) Defendants' Motion for Judgment on the Pleadings or for Partial Summary Judgment on Count II of Plaintiffs' Complaint at Civil Action No. 88-2548 (Document No. 34) be denied;

(4) Defendants' Motion to Strike Plaintiffs' Demand for Jury Trial at Civil Action No. 88-2548 (Document No. 35) be denied as moot;

(5) Defendants' Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment as to Plaintiffs' Requests for Extracontractual Damages and Class Wide Relief at Civil Action No. 88-2548 (Document No. 36) be granted;

(6) Defendants' Motion for Summary Judgment on Count I of Plaintiffs' Complaint at Civil Action No. 88-2548 (Document No. 37) be denied;

(7) Motion to Dismiss filed by the Union at Civil Action No. 90-1805 (Document No. 6) be granted; and

(8) Motion to Maintain a Class Action and for Certification of Class at Civil Action No. 91-1041 (Document No. 8) be denied.

The parties were allowed ten days from the date of service to file objections. Service was made on all counsel by first-class mail on June 30, 1994. The following objections and responses have been filed to the Report and Recommendation of June 30, 1994 (Document No. 104):

(1) Plaintiff Golonka's Objection to the Magistrate's Report and Recommendation (Document No. 106 at Civil Action No. 88-2548) filed on July 15, 1994;

(2) Plaintiff Golonka's Brief in Support of the Objection to the Magistrate's Report and Recommendation (Document No. 107 at Civil Action No. 88-2548) filed on July 19, 1994;

(3) Defendants' Objections to Report and Recommendation of Magistrate Judge Kenneth J. Benson dated June 30, 1994, and Served

by Mail (Document No. 108 at Civil Action No. 88-2548) filed by defendant Spang & Company and defendant Pension Plan for Former Bargaining Unit Employees of Fort Pitt Bridge and Electric Weld Divisions at Canonsburg, PA Plant on July 20, 1994;

(4) Correction to Defendants' Objections to Report and Recommendation of Magistrate Judge Kenneth J. Benson (Document No. 109 at Civil Action No. 88-2548) filed by defendants Spang & Company and Pension Plan for Former Bargaining Unit Employees of Fort Pitt Bridge and Electric Weld Division of Canonsburg, PA Plant on July 20, 1994;

(5) Defendants' Brief in Opposition to Spang's Objections to the Magistrate Judge's Report (Document No. 31 at Civil Action No. 90-1805) filed by defendants United Steelworkers of America, Daniel P. McIntyre, William T. Payne, Karin Feldman and John Does 1-20 on August 1, 1994;

(6) Plaintiff-Participants' August 2, 1994 Brief Responding to Spang's Objections (Document No. 110 at Civil Action No. 88-2548) filed on August 2, 1994;

(7) Plaintiff-Participants' August 2, 1994 Supplement Answering Particular Spang Arguments (Document No. 111 at Civil Action No. 88-2548) filed on August 2, 1994;

(8) Defendants' Brief in Support of Objections to Report and Recommendations of Magistrate Judge Kenneth J. Benson (Document No. 112 at Civil Action No. 88-2548) filed by defendants Spang & Company and The

Pension Plan for Former Bargaining Unit Employees of Fort Pitt Bridge and Electric Weld Division of Canonsburg, PA Plant on August 9, 1994;

(9) Appendix to Defendants' Brief in Support of Objections to Report and Recommendation of Magistrate Judge Kenneth J. Benson (Document No. 113 at Civil Action No. 88-2548) filed on August 9, 1994.

After *de novo* review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 6th day of September, 1994,

IT IS HEREBY ORDERED as follows:

(1) Motion for Summary Judgment filed by plaintiffs at Civil Action No. 88-2548 (Document No. 28) is GRANTED;

(2) Defendants' Motion to Disqualify Certain of Plaintiffs' Attorneys at Civil Action No. 88-2548 (Document No. 31) is DENIED;

(3) Defendants' Motion for Judgment on the Pleadings or for Partial Summary Judgment on County [*sic*] II of Plaintiffs' Complaint at Civil Action No. 88-2548 (Document No. 34) is DENIED;

(4) Defendants' Motion to Strike Plaintiffs' Demand for Jury Trial at Civil Action No. 88-2548 (Document No. 35) is DENIED AS MOOT;

(5) Defendants' Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment as to Plaintiffs' Requests

for Extracontractual Damages and Class Wide Relief at Civil Action No. 88-2548 (Document No. 36) is GRANTED;

(6) Defendants' Motion for Summary Judgment on Count I of the Plaintiffs' Complaint at Civil Action No. 88-2548 (Document No. 37) is DENIED;

IT IS FURTHER ORDERED that the motion to dismiss filed at Civil Action No. 90-1805 (Document No. 6) is GRANTED for the reasons set forth in the Report and Recommendation of the U.S. Magistrate Judge (Document No. 104) and for the additional reason that under the facts and the law the defendants in Civil Action 90-1805 had neither an express nor implied duty to preserve records and documents for the benefit of Spang and Company as asserted in Count IV of the Complaint.[1]

---

[1] In ¶ 9 of the shutdown agreement appended to the Complaint, it is stated:

> Any and all prior negotiations and preliminary drafts and prior versions of this agreement, whether signed or unsigned, between the parties leading up to its execution and not set forth herein shall not be used by either party to construe the terms or affect the validity of this agreement.

Thus, the defendants had no legal duty in that regard. *Cf. Koplin v. Rosel Well Perforators, Inc.*, 734 P. 2d 1177 (Kan. 1987) ("Absent some special relationship or duty rising by reason of an agreement, contract, statute, or other special circumstance, the general rule is that there is no duty to preserve evidence for another party to aid that other party in some future legal action against a third party."); *Wilson v. Beloit Corp.*, 725 F.Supp. 1056 (W.D. Ark. 1989); *Favaloro v. S/S Golden Gate*, 687 F. Supp. 475 (N.D. Cal. 1987); *Spano v. McAvoy*, 589 F. Supp. 423 (N.D. N.Y., 1987); *Caldwell v. City of Philadelphia*, 517 A.2d 1296 (Pa. Super.

IT IS ALSO ORDERED that the motion to maintain a class action and for certification of class at Civil Action No. 91-1041 (Document No. 8) is DENIED.

IT IS FURTHER ORDERED that this case is remanded to the Magistrate Judge for the purpose of determining and recommending specific appropriate relief for the plaintiffs at Civil Action No. 88-2548 and Civil Action No. 91-1041, including but not limited to the appropriate method of distributing the surplus funds in the plan, that is, the funds remaining in the plan as of the date of its termination, together with such other relief that may be appropriate.[2]

The Report and Recommendation of the United States Magistrate Judge dated June 30, 1994 (Document No. 104), except as modified herein, is adopted as the opinion of the Court.

/s/ Donald J. Lee
Donald J. Lee
United States District Judge

cc Honorable Kenneth J. Benson
United States Magistrate Judge

1986). The Court finds that *Liebig v. Consol. Rail Corp.*, No. 91-00609 (C.P., Lebanon Co., PA (1994), relied on by Spang and Company is inapposite on its facts.

[2] The complaints request, *inter alia*, that Spang be removed as fiduciary and an independent administrator to administer the plan be appointed; that Spang account for excess assets removed from the plan; the Court award plaintiffs compensatory damages and exemplary damages; the Court award the plaintiffs attorneys' fees, costs and any other appropriate relief.

Kathryn L. Simpson, Esquire
Grogan, Graffam, McGinley
and Lucchino, P.C.
Three Gateway Center
22nd Floor
Pittsburgh, PA 15222

William T. Payne, Esquire
Schwartz, Steinsapir, Dohrmann
and Sommers
3580 Wilshire Boulevard
Suite 1820
Los Angeles, CA 9010 [*sic*]-2594

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	)	Civil Action Nos.
SPANG & COMPANY LITIGATION	)	88-2548, 90-1805, 91-1041

ORDER OF COURT

AND NOW, this 22nd day of September, 1994, after telephone conference with Kevin Lucas, Esquire, Alan Lubel, Esquire, Kathryn L. Simpson, Esquire, and Daniel P. McIntyre, Esquire, and after consideration of the Motion to Defer Disposition of Matters Referred to in Memorandum order (Document No. 120 at Civil Action No. 88-2548), it is hereby

ORDERED that said motion (Document No. 120 at Civil Action No. 88-2548) is GRANTED IN PART and DENIED IN PART as follows:

(i) The September 6, 1994, Memorandum Order (Document No. 118 at Civil Action No. 88-2548) is hereby AMENDED as follows:

(A) To the extent it relates to Civil Action No. 90-1805, the first full unnumbered paragraph on Page 4 and Footnote 1 thereto are deleted in entirety, and the order of dismissal granted pursuant thereto in Civil Action No. 90-1805 is hereby vacated;

(B) The reference in ¶ 3 on Page 2 is hereby changed from July 20, 1994, to July 19, 1994;

(ii) The aforesaid motion as it relates to Civil Action Nos. 88-2548 and 91-1041 and the alternative request to enter final judgment pursuant to F.R.C.P. 54(b) is DENIED.

/s/ Donald J. Lee
Donald J. Lee
United States District Judge

cc Honorable Kenneth J. Benson
United States Magistrate Judge

Kathryn L. Simpson, Esquire
Grogan, Graffam, McGinley
and Lucchino, P.C.
Three Gateway Center
22nd Floor
Pittsburgh, PA 15222

William T. Payne, Esquire
Schwartz, Steinsapir, Dohrmann
and Sommers
3580 Wilshire Boulevard
Suite 1820
Los Angeles, CA 9010 [*sic*]-2594

Hollis T. Hurd, Esquire
The Benefits Department
900 Fifth Avenue
Pittsburgh, PA 15219

Kevin P. Lucas, Esquire
Manion, McDonough and Lucas, P.C.
600 Grant Street
Suite 882
Pittsburgh, PA 15219

P. Jerome Richey, Esquire
Buchanan, Ingersoll P.C.
5800 USX Tower
600 Grant Street
Pittsburgh, PA 15219

Richard E. Gordon, Esquire
Grossinger, Gordon and Vatz
1000 Law and Finance Building
Pittsburgh, PA 15219

Virginia A. Seitz, Esquire
Jeremiah A. Collins, Esquire
Bredhoff and Kaiser
1000 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036

Daniel P. McIntyre, Esquire
40 Old Mill Road
Falmouth, ME 04105

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	)	Civil Action Nos. 88-2548
SPANG & COMPANY	)	90-1805, 91-1041
LITIGATION	)	JUDGE DONALD J. LEE/
	)	MAGISTRATE
	)	JUDGE BENSON

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that this court enter an order directing that Spang be required to repay the entire amount of the reversion it took from the Plan, with interest since the date of Plan termination. It is further recommended that this court certify a class of plaintiffs consisting of all those persons entitled under the Plan to participate in the distribution of excess Plan assets as of the date of termination of the Plan. Finally, it is recommended that this court direct that the Plan be reconstituted, and that the individual class members be paid their share of recovery pursuant to the terms of the Plan.

II. REPORT

At the outset of the report and recommendation issued in this matter in June, 1994, disposing of seven motions, I indicated that this case has become much more complex than it need to have. Indeed, rulings on those

motions, and the dispositive ruling that plaintiffs[1] are entitled to recover from Spang amounts it improperly retained as a reversion of the excess pension assets, have not exhausted every complex issue and nice dispute in this case. After the report and recommendation was adopted by Judge Lee (Docket #118), the parties have filed various pleadings addressing the issue of the nature and form of the remedy in this matter (Docket #127, #128, #131, #132, #133, #134). The issues presently before the court are (1) the nature of the corpus to be refunded by Spang; and (2) the plan participants entitled to share in the recovery.

FACTUAL BACKGROUND

Recitation of the entire history of the pension and the collective bargaining agreements is not necessary at this point. It is important, however, to remember the specific language of the Plan, as evidenced in the Pension Agreements, which was the basis for this court's previous ruling. In each of the Pension Agreements entered into between the Union and Spang from 1963, and including the last agreement in 1978, the following provision appeared:

---

[1] Plaintiffs at 88-2548 and 91-1041 are persons entitled to receive benefits under a pension plan (the "Plan") sponsored and administered by the Plan's sole trustee, Spang, for the benefit of employees at Spang's Fort Pitt Bridge and Electric Weld plants in Canonsburg, Pennsylvania. Although Spang is also a "Plaintiff" at a consolidated case, 90-1805, I will hereafter refer to the pensioners as "plaintiffs" for purposes of continuity.

> The contributions made by the Company to the Pension Fund may not under any circumstances revert to the Company. If this Pension Plan shall terminate, the funds in the Pension Fund shall be used in the manner provided in Article IX of this Agreement.

(Docket #102, Exhibit 1 at 34). Also relevant are the 1981 and 1988 purported amendments to the Plan, wherein Spang attempted to insert, *inter alia*, the following provision:

> To the extent that there remains a surplus of assets of the trust fund after fully funding all of the above-determined liabilities due to benefits payable under this Plan, such surplus shall be deemed to be due to actuarial error and shall be returned to the Company.

Docket # 99, Exhibit N at 60).

1. THE "CORPUS" FROM WHICH DISTRIBUTION MUST BE MADE

Spang first asserts that the court has not ruled definitively on what portion of the reversion taken by Spang must be disgorged by Spang for redistribution.[2] Spang argues that the court has not specified that the entire reversion must be repaid, and argues that it ought

---

[2] Spang, of course, has not conceded the propriety of this court's rulings on the issue of reversion. The arguments presently made by Spang are in the alternative to arguments which it intends to press on appeal from a final judgment in this matter.

to retain all amounts which are attributable not to "contributions" made to the fund, but to interest and other earnings from those contributions. Spang recognizes that the court has ruled that it may not seek reversion of any "contributions" it has made to the fund. The fund, however, is made up entirely of Spang's contributions, plus any interest or other earnings accumulated. Spang asserts that even if it may be required to repay that portion of the reversion which constitutes "contributions" it has made to the pension fund, it may nonetheless retain the interest or other earnings since the non-reversion clause set forth above speaks only to contributions.

The report and recommendation previously entered, and which has been adopted as the opinion of the court, specifically held that the Plan requires that surplus funds be paid to the plaintiffs, and that Spang is not entitled to reversion of such funds. Spang interprets this language, and particularly the use of the term "fund" as injecting some ambiguity into the court's ruling on the plaintiffs' motion for summary judgment. "Fund" is a term of art in the context of pension plans, and has been interpreted in the context of certain pension plans to mean only those monies in a pension plan which are necessary to pay out benefits. I can discern no such ambiguity. This court has ruled that the entire amount of the reversion must be repaid. This necessarily includes any amounts which Spang identifies, or is able to identify, as interest or earnings. In order to dispel any further dispute over this court's ruling, however, I will address Spang's argument in detail. In my view, Spang's argument must be rejected for two reasons.

First, even if, as Spang asserts, there is no absolute bar to its recovering "interest and earnings" as opposed to "contributions," there is no effective provision in the Plan which would permit reversion of any amount to Spang, whether denominated "contribution" or "interest." It must be remembered that the court relied upon alternative bases for requiring Spang to disgorge the reversion, although both findings may generally be couched in terms of Spang having violated the terms of the Plan. The first holding was that Spang had violated the terms of the Plan by unilaterally amending the Plan in 1981 and 1988 to provide for reversion when there was no specific procedure in the Plan providing for such amendments. In this respect, the court relied upon *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d Cir. 1994), for the proposition that an ERISA plan may not be amended unless the plan provides a specific procedure for amendment. Here, the Plan, as evidenced by the sole governing document, does not provide for amendment, and certainly not for unilateral amendment by Spang. Thus, Spang's proposed amendments in 1981 and 1988 were found to be invalid. Absent these amendments, there is no provision in the Plan allowing any type of reversion. Therefore, the question of whether or not Spang could properly amend the Plan to provide for reversion of interest and other earnings need not be reached since Spang did *not* properly amend the Plan to provide for any such reversion. Accordingly, plaintiffs are entitled to repayment of the entire amount of the reversion taken by Spang, since there is no effective amendment to the Plan which provides for reversion of any amount to Spang.

Second, even if Spang had properly amended the Plan to provide for reversion of interest and earnings on contributions, the court's second holding would bar reversion since an amendment providing for reversion of interest and earnings would fail as being at odds with the non-reversion provision of the Plan. Spang asserts that the fact that it may not be entitled to reversion of all of the surplus does not prevent it from seeking reversion of sums which are not identified with particularity in the non-reversion clause of the Plan, i.e., any sums which are not "contributions." Spang relies upon cases which interpret non-reversion clauses that are addressed solely to "funds," a term of art in ERISA cases. For example, in *I.U.E. v. Murata Erie North America, Inc.*, 980 F.2d 889 (3d Cir. 1992), the court found that the following non-reversion clause would not prevent an employer from amending the Plan to provide for reversion of surplus:

> "n[o] . . . amendment shall vest in the Company any right, title, or interest in or to the funds held by the Trustee."

Id. at 904. The court found that this did not prevent the employer from amending the plan to provide for reversion of all surplus amounts:

> The limitation on amendments only stated that the company could not amend the Plans to allow it to have an interest in 'funds held by the Trustee.' 'Fund' is defined in section 1.05 of the Plan documents as 'the Trust Fund held pursuant to the Agreement,' while 'the Agreement' is defined as 'the Agreement . . . to be used for funding benefits under the Plan.' Hence, 'funds held by the Trustee' refers only to those funds necessary to for funding benefits under the

> Plans and not to money remaining once all benefits have been paid out. Not only is this definition of 'funds' provided in these particular Plans, but it is also the meaning given to 'funds' by courts in similar contexts. *See, Wilson [v.Bluefield Supply Co.,]* 819 F.2d [457,] at 463-65 [(4th Cir. 1987)]; *[In re C.D.] Moyer [Trust Fund]*, 441 F.Supp. [1128,] at 1131-32 [(E.D.Pa. 1977)].

International Union, 980 F.2d at 906. Thus, in instances where a non-reversion clause refers only to "funds" and where the term "funds" is defined as consisting of only those monies necessary to pay benefits, there is no bar to an employer amending a plan to obtain reversion of any excess monies. Spang argues that a similar analysis applies here. To-wit, since the non-reversion clause only speaks to "contributions" from the employer, any sums which are not contributions must be available for reversion.

There is a real danger in this case that discussion of the issue of reversion will devolve into a semantical debate. Nonetheless, non-reversion clauses have been parsed with some vigor in the case law, and the wording of such clauses defines a company's ability to obtain a reversion. Here, however, there is no language in the Pension Agreement which can be interpreted in a manner consistent with the language addressed in *I.U.E., supra.* Indeed, unlike *I.U.E.*, there is no definition of the term "fund" in the Plan, and, hence, no way in which the court may say that the term "fund" has been defined as encompassing only those assets necessary to pay defined benefits. Second, a finding that the Agreement does not address the issue of interest or earnings from contributions would be contrary to the express terms of the

Agreement. The non-reversion provision does more than simply prevent Spang from ever regaining any contributions it has made to the Fund. It also states that in the event of termination of the Plan, "the funds in the Pension Fund shall be used in the manner provided in Article IX of this Agreement."[3] Article IX provides for increasing benefits to all participants should the prior allocation of funds "no longer be justified" due to "changes in mortality and investment experience, or for other reasons." (Docket #102, Exhibit 1 at 36). The Pension Agreement, which is the sole governing document, specifically provides both that no contribution from Spang may revert to Spang under any circumstances, and that "investment experience" could result in an increase in benefits to participants. In the context of increasing benefits, "investment experience" could only be referring to interest and earnings on contributions which, if larger than anticipated, would be paid out to Plan participants.

Thus, Spang's position, which relies upon the analyses set forth in *I.U.E.*, *Wilson* and *Moyer* is unpersuasive since in those cases the plans at issue defined the term "fund" in a manner which limited the non-reversion provisions in those plans to only those assets necessary to fund defined benefits. That is not the case here. In fact, applying the rationale of those cases here would be inconsistent with express provisions of the Plan which require that, upon termination, all assets of the Plan,

---

[3] Again, it must be remembered that there is no limiting definition of "fund" in the Plan which would make this statement applicable to only a certain portion of the assets held by the Plan.

including "excess" assets due to interest and earnings, i.e., assets not necessary to pay defined benefits and which flow from earnings or interest on contributions made to the Plan, be paid to Plan participants. Plaintiffs are entitled to recover the entire amount of the excess assets in the fund at the time of termination.

2. PLAN PARTICIPANTS ENTITLED TO DISTRIBUTION

Having concluded that the entire amount of the reversion must be repaid and distributed, the next issue to be addressed concerns the identity of persons entitled to recovery. The first option, that only the named plaintiffs are entitled to recovery, must be rejected. This court has already noted that "relief in this case is enforcement of the terms of the Plan." (Docket #104 at 18) . Indeed, the court has granted summary judgment on the basis that Spang was required by the terms of the Plan to refrain from taking a reversion of the Fund's assets, and to pay those assets (whether the product of contributions, or earnings from contributions) to the plan participants in accordance with the terms of the Plan. "Although surplus funds are not specifically addressed therein, reading Section IX in concert with the non-reversion provision leads to the inescapable conclusion that the surplus funds must be distributed to the participants in the fund." (Docket #104 at 18).

This court has, then, ruled that *all* Plan participants who would be entitled to distribution of the excess assets upon Plan termination under Article IX are entitled to share in the recovery in this case. Spang asserts that it is

unclear which portion of ERISA this court was relying upon in making this ruling, and that the nature of the relief available is dependent upon the source of the remedy. Specifically, Spang interprets Section 502(a)(2) as providing for plan-wide relief only if a plan still exists, or a class has been certified. *See, Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 n.7 (3d Cir. 1990) (Plan participants may sue under § 502(a)(2) in "representational capacity on behalf of the plan as a whole."). Spang also points to *Gruber v. Hubbard Bert Karle Webber, Inc.*, 675 F.Supp. 281 (W.D.Pa. 1987), *vacated on other grounds*, 684 F.Supp. 879 (W.D.Pa. 1988) for the proposition that, where a plan has terminated, relief may be granted directly to a class consisting of the beneficiaries. Thus, it is asserted, since there is neither a plan, nor a certified class, relief may not be granted plan-wide under Section 502(a)(2).

Spang also asserts that relief under § 502(a)(3) is "broad-based" and "collective in nature." Spang, apparently, believes that this section would also be limited to granting of relief either to the plan, or to a class of beneficiaries. There is, however, no case law cited for such a proposition.

Finally, Spang asserts that an action pursuant to § 502(a)(1)(B) is personal in nature and provides no means by which to afford plan-wide relief. I recognize that § 502(a)(1)(B) is written in the singular, i.e., "to recover benefits due to him under the terms of his plan to enforce his rights. . . . ." 29 U.S.C. § 1132(a)(1)(B). The Third Circuit, however, has expressly declined "to rule out the possibility of individual beneficiaries bringing class actions under subsection (a)(1)(B) or to suggest that such class actions might not in fact have much the same

effect as actions brought under subsection (a) (3)." *Livolsi v. Ram Construction Co., Inc.*, 728 F.2d 600, 602 n.5 (3d Cir. 1984).

Therefore, there would appear to be no impediment to granting plan-wide relief in this case, except that the court may be required to certify a class since the plan has been terminated. Plaintiffs, on the other hand, assert that this court may simply order Spang to reconstitute the Plan and pay out benefits thereunder. Plaintiffs also assert that, failing reconstitution of the Plan, the court may impose a constructive trust which would achieve the same result. *See, ACTWU v. Murdock*, 861 F.2d 1406, 1413 (9th Cir. 1988) ("There is no doubt that . . . a constructive trust remedy is available under the catchall relief provisions of both ERISA § 409(a) and § 502(a)(3)."). Plaintiffs also note that the intent of the ERISA remedies provisions are to place the plaintiffs in the same position they would have been in had the breach of fiduciary duty not occurred. In this case, that would mean paying to plaintiffs the benefits they would be entitled to, plus interest, had the lawful termination of the Plan in 1988 been accompanied not by an improper reversion, but by Spang paying out the excess Plan assets in accordance with the Article IX of the Plan. Plaintiffs assert that reconstituting the Plan would operate to place them in as near the same position as possible since it would also give plaintiffs the best chance of obtaining the tax benefits of receiving payments from a pension plan. I agree that this last result would be most in keeping with the purposes of ERISA. In order to reach this result, however, I believe that this court must reconsider its prior rulings on class certification.

This court has addressed the issue of class certification twice previously, first determining that the motion was filed too late at Civil Action No. 88-2458 [*sic*], and by finding that certification would not be necessary since any relief would have the effect of securing relief for all participants in the Plan (Docket #104 at 18). Plaintiffs again assert, however, that class certification would be an appropriate and effective means of determining the number and identity of persons entitled to participate in recovery, and would facilitate the granting of relief under § 502 of ERISA. Indeed, the report and recommendation entered with respect to plaintiff's ERISA claims can most easily be read as granting relief under § 502(a)(1)(B). The holding, however, is not inconsistent with a grant of relief under § 502(a)(2), since a failure to pay benefits under a Plan is a violation of a fiduciary duty under ERISA. *Kann v. Keystone Resources, Inc.*, 575 F.Supp.1084 (Pa. 1983). In fact, the court's ruling is also conclusive in this respect, since there has been an express finding that Spang, as administrator of the Plan, failed to pay benefits in accordance with the terms of the Plan. Hence, the court has in effect ruled that there have been violations of both § 502(a)(1)(B) and § 502(a)(2).

The existence of a class would permit plan-wide recovery, in my view, under either §502(a)(1)(B) or § 502(a)(2). Therefore, I respectfully recommend that a class be certified consisting of all those persons who were entitled to share in the excess assets of the Plan at the time that the Plan was terminated in 1988.[4] Although this

---

[4] In this respect, it must be remembered that the Plan was legally terminated. The illegality arose when the excess assets

constitutes a reversal of this court's earlier rulings, it is not inconsistent with the intent of the court with respect to the denial of the latter motion to certify a class. In particular, the motion was most recently denied since the court was of the opinion that plan-wide relief would flow from the determination that Spang failed to comply with the provisions of the Plan by taking the reversion. While this may be the case, it has become apparent that the most appropriate fashion in which to effectuate relief in this case is to reconsider the motion to certify the class, and then grant relief under both § 502(a)(1)(B) and § 502(a)(2) in the form of reconstituting the Plan, and directing that the excess assets be distributed thereunder.

CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that this court enter an order directing that Spang be required to repay the entire amount of the reversion it took from the Plan, with interest since the date of Plan termination.[5] It is further recommended that

---

were not distributed to Plan participants pursuant to Article IX of the Plan. Therefore, the operative date concerning entitlement to share in the division of the excess is the date of termination, and the method of computing the division lies within Article IX.

[5] *See, Kay v. Thrift and Profit Sharing Plan*, 780 F.Supp. 1447, 1462 (E.D.Pa. 1991) (courts have awarded prejudgment interest in ERISA cases where beneficiaries have been denied benefits); *Donovan v. Bryans*, 566 F.Supp. 1258, 1265 (E.D.Pa. 1983) (Court has discretion to determine rate of interest to compensate beneficiaries for breach of duty, although generally the rate is simple interest at the legal rate); *United Steelworkers v. Newman-*

this court certify a class of plaintiffs consisting of all those persons entitled under the Plan to participate in the distribution of excess Plan assets as of the date of termination of the Plan. Finally, it is recommended that this court direct that the Plan be reconstituted, and that the individual class members be paid their share of recovery pursuant to the terms of the Plan.

In accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(1)(B) and (C), and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file objections to this report.

/s/ Kenneth J. Benson
KENNETH J. BENSON
UNITED STATES
MAGISTRATE JUDGE

Dated: February 10, 1995

cc: Kathryn L. Simpson, Esquire
Grogan, Graffam, McGinley
& Lucchino, P.C.
Three Gateway Center, 22nd Floor
Pittsburgh, PA 15222

Crosby Steel, 822 F.Supp. 862, at 869 ("Members of the pension class are entitled to recover the supplemental pension benefits that should have been paid to them since March, 1986, plus interest."); *Diduck v. Kaszycki & Sons Contractors, Inc.*, 774 F.Supp. 802, 814 (S.D.N.Y. 1991) ("ERISA grants the court wide discretion in fashioning equitable relief to protect the rights of pension fund beneficiaries including award of prejudgment interest.").

William T. Payne, Esquire
Schwartz, Steinsapir, Dohrmann
& Sommers
3580 Wilshire Boulevard
Suite 1820
Los Angeles, CA 90010-2594

Hollis T. Hurd, Esquire
The Benefits Department
900 Fifth Avenue
Pittsburgh, PA 15219

Kevin P. Lucas, Esquire
Manion, McDonough & Lucas, P.C.
600 Grant Street
Suite 882
Pittsburgh, PA 15219

Kenneth R. Russell, Jr., Esquire
Alan E. Lubel, Esquire
Troutman Sanders
600 Peachtree Street, N.E.
Suite 5200, Nations Bank Plaza
Atlanta, GA 30308-2216

P. Jerome Richey, Esquire
Buchanan, Ingersoll P.C.
5800 USX Tower
600 Grant Street
Pittsburgh, PA 15219

Richard E. Gordon, Esquire
Grossinger, Gordon & Vatz
1000 Law & Finance Building
Pittsburgh, PA 15219

Virginia A. Seitz, Esquire
Jeremiah A. Collins, Esquire
Bredhoff & Kaiser
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036

Daniel P. McIntyre, Esquire
40 Old Mill Road
Falmouth, ME 04105

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	)	Civil Action Nos. 88-2548
SPANG & COMPANY	)	90-1805, 91-1041
LITIGATION	)	JUDGE DONALD J. LEE/
	)	MAGISTRATE
	)	JUDGE BENSON

MEMORANDUM ORDER

On January 22, 1993, this case was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(A) and (B), and Local Rule 72.1.3.

A Memorandum Order was entered in this case on various dispositive motions by the parties on January 22, 1993 (Docket #118), and that order was modified on September 22, 1994 (Docket #124). The matter was then returned to the Magistrate Judge for further rulings concerning the appropriate remedy. Plaintiffs filed a statement concerning remedy on October 18, 1994 (Docket #127), and Spang filed a reply on November 2, 1994 (Docket #128). Further memoranda and replies were filed by the parties at the direction of the Magistrate Judge (Docket #131, #132, #133, and #134).

The Magistrate Judge's Report and Recommendation was filed on February 10, 1995, (Docket #137) in which it was recommended:

(1) that Spang be ordered to repay the entire amount of the reversion taken from the Plan, with interest since the date of Plan termination;

(2) that a class be certified consisting of all those persons entitled under the Plan to participate in the distribution of assets as of the date of Plan termination;

(3) that the individual class members be paid their share of recovery pursuant to the terms of the Plan.

The parties were allowed ten days from the date of service to file objections. Service was made on all counsel by first-class mail on February 10, 1995. Objections were filed by plaintiffs on February 27, 1995 (Docket #139) and by Spang on February 28, 1995 (Docket #140). Plaintiffs also filed a response to Spang's objections on March 9, 1995 (Docket #141).

The parties also exchanged letters concerning the import of a recent Supreme Court ruling in *Curtiss-Wright Corp. v. Schoonejongen*, ___U.S. ___, 115 S.Ct. 1223 (1995).

One matter addressed in the objections of the parties needs to be addressed, and that is the nature of the prejudgment interest due to plaintiffs on the recovery from Spang. Plaintiffs assert that interest should be computed by reference to "quasi-public indices that track appreciation, such as the Standard & Poor's 500 Index." Spang counters that the appropriate measure of interest is the statutory rate for post-judgment interest set forth at 28 U.S.C. § 1961.

In arguing in favor of their position, plaintiffs cite to cases such as *Dasler v. E.F. Hutton & Co., Inc.*, 694 F.Supp. 624 (D.Minn. 1988). In *Dasler*, the court addressed a situation where the ERISA fiduciary had engaged in excessive

trading, resulting in losses to the Plan. In measuring damages, the court compared the plan's actual performance with the Standard & Poor's 500. *See also, Martin v. Feiler,* 965 F.2d 660 (8th Cir. 1992) (measuring damages for self-dealing by fiduciary). Here, however, the Plan was properly terminated effective August 31, 1988, but the Plan proceeds were not paid out to participants at termination. Hence, this is not a situation where the court must find a means of measuring the actual damages suffered by the Plan. The amount of damages in this case is a sum certain; the entire amount of the reversion taken by Spang. Where damages are thus quantifiable, however, courts have granted pre-judgment interest in ERISA cases at the rate provided for in 28 U.S.C. § 1961 for post-judgment interest. *Dependahl v. Falstaff Brewing Corp,,* 653 F.2d 1208 (8th Cir.), *cert. denied,* 454 U.S. 968 (1981); *Kay v. Thrift and Profit Sharing Plan,* 780 F.Supp. 1447 (E.D.Pa. 1991). Therefore, plaintiffs are entitled to damages in an amount equal to the entire amount of the reversion taken by Spang, plus interest, at the rate provided for in 28 U.S.C. § 1961, since the date of Plan termination, August 31, 1988.

After *de novo* review of the pleadings and documents in the case, together with the report and recommendation, objections and response thereto, the following order is entered:

AND NOW, this 30th day of March, 1995;

IT IS HEREBY ORDERED that the Plan be reconstituted, and that Spang pay into the Plan the entire amount of the reversion it took upon Plan termination, plus interest since August 31, 1988.

IT IS FURTHER ORDERED that a class be certified consisting of all persons entitled under the Plan to participate in the distribution of excess Plan assets as of August 31, 1988, and that individual class members be paid their share of recovery pursuant to the terms of the Plan.

The Report and Recommendation of United States Magistrate Judge Kenneth J. Benson, dated February 10, 1995 (Document #137), is adopted as the opinion of the Court.

/s/ Donald J. Lee
DONALD J. LEE
UNITED STATES
DISTRICT JUDGE

cc: Honorable Kenneth J. Benson
United States Magistrate Judge

Kathryn L. Simpson, Esquire
Grogan, Graffam, McGinley
& Lucchino, P.C.
Three Gateway Center, 22nd Floor
Pittsburgh, PA 15222

William T. Payne, Esquire
Schwartz, Steinsapir, Dohrmann
& Sommers
3580 Wilshire Boulevard
Suite 1820
Los Angeles, CA 90010-2594

Hollis T. Hurd, Esquire
The Benefits Department
900 Fifth Avenue
Pittsburgh, PA 15219

Kevin P. Lucas, Esquire
Manion, McDonough & Lucas, P.C.
600 Grant Street
Suite 882
Pittsburgh, PA 15219

Kenneth R. Russell, Jr., Esquire
Troutman Sanders
600 Peachtree Street, N.E.
Suite 5200, Nations Bank Plaza
Atlanta, GA 30308-2216

P. Jerome Richey, Esquire
Buchanan, Ingersoll P.C.
5800 USX Tower
600 Grant Street
Pittsburgh, PA 15219

Richard E. Gordon, Esquire
Grossinger, Gordon & Vatz
1000 Law & Finance Building
Pittsburgh, PA 15219

Virginia A. Seitz, Esquire
Jeremiah A. Collins, Esquire
Bredhoff & Kaiser
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036

Daniel P. McIntyre, Esquire
40 Old Mill Road
Falmouth, ME 04105

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-3218 and 95-3248

JEAN E. BRYTUS; JOHN LAZOR; WHEAT GIACOBBE; JOHN STANKO, STEVE KOTYK; ALEX WARCHOLAK, and others similarly situated; JOHN KOTYK; SAM BORIELLE, JR., and others similarly situated

v.

SPANG & COMPANY; UNION NATIONAL BANK; PENSION PLAN, for Former Bargaining United Employees of Fort Pitt Bridge and Electric Weld Divisions at Canonsburg, PA, Plant;

(D.C. Civil No. 88-cv-02548)

EDWARD J. GOLONKA, and others similarly situated

v.

SPANG & COMPANY; PENSION PLAN FOR FORMER BARGAINING UNIT EMPLOYEES FORT PITT BRIDGE AND ELECTRIC WELD DIVISION AT CANONSBURG, PA. PLANT

(D.C. Civil No. 91-cv-01041)

SPANG & COMPANY AND THE PENSION PLAN FOR FORMER BARGAINING UNIT EMPLOYEES OF FORT PITT BRIDGE and ELECTRIC WELD DIVISION OF CANONSBURG, PA, PLANT,

Appellants in No. 95-3218

(Amended per the Clerk's order of 8/29/95

JEAN E. BRYTUS; JOHN LAZOR; WHEAT GIACOBBE; JOHN STANKO, STEVE KOTYK; ALEX WARCHOLAK, and others similarly situated; JOHN KOTYK; SAM BORIELLE, JR., and others similarly situated

v.

SPANG & COMPANY; UNION NATIONAL BANK; PENSION PLAN, for Former Bargaining Unit Employees of Fort Pitt Bridge and Electric Weld Divisions at Canonsburg, PA, Plant;

(D.C. Civil No. 88-cv-02548)

EDWARD J. GOLONKA, and other similarly situated

v.

SPANG & COMPANY; PENSION PLAN FOR FORMER BARGAINING UNIT EMPLOYEES FORT PITT BRIDGE AND ELECTRIC WELD DIVISION AT CANONSBURG, PA, PLANT

(D.C. Civil No. 91-cv-01041)

JEAN E. BRYTUS, JOHN LAZOR, WHEAT GIACOBBE; JOHN STANKO, STEVE KOTYK, ALEX WARCHOLAK and others similarly situated; JOHN KOTYK, SAM BORIELLE and others similarly situated, EDWARD J. GOLONKA, and others similarly situated,

Appellants in No. 95-3248

(Amended Per the Clerk's order of 8/29/95)

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 88-02548)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, SAROKIN, and LAY,* *Circuit Judges*

The petition for rehearing filed by the appellants-cross appellees, Spang & Company and the Pension Plan for Former Bargaining Unit Employees of Fort Pitt Bridge and Electric Weld Division of Canonsburg, Pa. Plant, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

/s/ Illegible
Circuit Judge

DATED: Mar 5 – 1996

---

* Honorable Donald P. Lay, Senior Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.